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In This Issue

SYMPOSIUM

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Symposium

PROVING THE RELEVANT MARKET IN SECTION 7 CASES

Sponsored by

THE ANTITRUST AND TRADE REGULATION LAW COMMITTEE

of the

FEDERAL BAR ASSOCIATION

held in

WASHINGTON, D. C.

RELEVANT MARKET PROBLEMS IN FTC MERGER CASES ON REVIEW IN THE COURTS

by

ALAN B. HOBBES

I wish to make it plain at once that my own manner of viewing the topic of relevant market under Section 7 of the Clayton Act is that of the appellate attorney charged with the defense of a Federal Trade Commission decision and order after trial, arguments, and the sifting and weighing of the record. As a consequence of this confining experience I am blessed with powers of limpid discernment that can be enjoyed only by him who has the gift of hindsight. By the time a merger case is ready for court review, the factual outline has been reduced to manageable proportions; significant facts have been selected from the original inchoate mass of detailed economic data; and the parties are usually in surprising harmony on the underlying facts, though the conceptualized model that each will present to the court may differ considerably from that offered by the opposition. Because of this hindsight approach, you may find yourselves silently accusing me of oversimplification. And you may be right.

Aside from the statute itself and the general language of the Congressional reports there are extremely few universally helpful guides for tracing the bounds of the relevant market. The District Court realized this in *U. S.* v. *Brown Shoe Co.,* 179 F. Supp. 721, 730 (E. D. Mo. 1959), when it observed that—

> an analysis of the maze of cases on the subject leads one to the conclusion that a "line of commerce" cannot be determined by any process of logic and should be determined by the process of observation.

Naturally the court was not scuttling *all* logic—only deductive inference. And while the fewness of suits brought so far under amended Section 7 relegates us at present to a groping empiricism in the determination of the relevant market, I would hope that by the time a representative variety of cases have finally been litigated—say, in

five years—judicial principles sufficiently definite to be of practical utility can be arrived at through the inductive process.

I have in mind giving thumbnail accounts of the differing relevant-market problems that were faced in three Federal Trade Commission matters that have reached the courts of appeals for oral argument. In each, the task of those who presented the proof was, as we shall see, dictated by the nature of the industry involved.

In the case of *Crown-Zellerbach Corporation* (F. T. C. Docket No. 6180; *Crown-Zellerbach Corp.* v. *Federal Trade Commission,* U. S. C. A. 9th Cir. No. 15904, argued Jan. 14, 1960), Crown —the acquiring company—manufactured practically all forms of paper. St. Helens—the acquired company—produced largely "coarse papers" (in the sense the word "coarse" is used by the Census Bureau, i.e., to denote wrapping papers and paper to be converted to such ends as bag paper, shipping-sack paper, gumming, waxing, and envelope papers).

Crown argued that the proper line of commerce to be considered was "coarse paper", but as that term is understood by Crown to be used in the trade. Under this concept, "coarse paper" comprises not only the Census coarse papers regarded as the relevant product line by the Commission but also special industrial papers, sanitary tissue stock, tissue paper, container board, bending board, nonbending board, cardboard, and all the converted paper products made from these grades of paper. It can be seen that this would have vastly enlarged the product line.

The Commission's exclusion of the additions proposed by Crown was based on three main factors: (1) the additional types as a class differed essentially from the Census coarse varieties as a class in such physical characteristics as weight and quality; (2) their end uses differed from those of the other group; and (3) the buyers of the additional types were not those who bought Census coarse papers.

The Commission held the relevant section of the country to be the Pacific and Mountain States—11 in all—where the acquired and acquiring concerns principally operated. It is arguable that the Commission even erred on the side of conservatism, for the three Pacific States (California, Oregon and Washington) accounted for the bulk of the output of the four principal producers of Census coarse papers —94%.

The eleven-state area was the home market for the Western coarse-paper mills generally. It was a territory of natural advantage for these mills, owing to lower freight costs and the fact that jobbers and converters located there had a better source of supply.

Crown argued for the inclusion of all twenty-two states west of the Mississippi. As a part of this argument, it contended that because it and St. Helens sold more paper in Texas than in the sparsely settled Mountain States, Texas should not have been excluded. Against this, however, stood the facts that Western mills accounted for the great bulk of the admittedly small tonnage shipped into the Mountain States, but only 20% of the enormous deliveries into Texas came from Western mills, and that Crown and the other Western producers themselves looked upon the eleven Western and Mountain States as their main sales territory. In the Commission's judgment, the record showed a definite economic cohesiveness in the coarse-paper trade of the eleven-state area not to be found elsewhere.

The second of my three examples is the case of *Erie Sand & Gravel Company* (F. T. C. Docket No. 6670; *Erie Sand & Gravel Company* v. *Federal Trade Commission,* U. S. C. A. 3d Cir. No. 13106, argued Feb. 6, 1961).

Here was presented a fundamentally different pattern of facts. Erie, the second largest supplier in interstate commerce of lake sand from Lake Erie sold along the southern shore of the Lake, acquired the largest supplier and thereafter had 92% of the sales.

The Commission found lake sand to be the relevant product. Lake sand is used chiefly for making concrete and is cleaner and otherwise of better quality than sand taken from pits or banks.

The relevant section was found to be the southern shore of Lake Erie, extending from Buffalo, N. Y., to Sandusky, Ohio, and running about ten or twelve miles inland, less in the large ports. This was the area within which both Erie and the acquired concern traded before the merger and which was thereafter dominated by Erie. To be sure, there were other regions in which lake sand is produced and sold, but the strip which came under notice was not served by the companies operating elsewhere, because of the high costs of shipping.

The determination of the relevant market was unusual in this case for this reason: the relevant product-line and the relevant sec-

tion were actually complementary aspects of the same thing. Sand is heavy and has a low specific value; the expense of moving it is high in proportion to its value. This has the effect of limiting its use to areas near the source of supply. In the towns along the southern shore of Lake Erie, pit or bank sand cannot compete in price with lake sand, which, being the sole type available there, is necessarily the relevant product.

Conversely, the southern shore of Lake Erie is the only area where the lake sand in question could be economically sold.

Lest you gain the impression that the Commission was here concerning itself with a merger of slight importance, may I point out that within the relevant market Erie became the "General Motors" of its industry! Certainly the geographical area involved was no more unreasonably delineated than the Washington (D. C.) metropolitan area for milk (*U. S.* v. *Maryland and Virginia Milk Producers Assn.,* 166 F. Supp. 799, 803 (D. C. 1958), *affirmed,* 362 U. S. 458, 468-469 (1960)).

In the third case, *A. G. Spalding & Bros., Inc.* (F. T. C. Docket No. 6478; *A. G. Spalding & Bros., Inc.* v. *Federal Trade Commission,* U. S. C. A. 3d Cir. No. 13277, argued Feb. 21, 1961) the product line was the only pertinent dimension, the company not seriously contesting the Commission's finding that the entire United States was the relevant section.

Spalding, the second largest producer of athletic goods, acquired Rawlings Manufacturing Company, the fourth largest producer of athletic goods. Both concerns manufactured baseballs, softballs, basketballs, footballs, soccer balls, volleyballs, and one sold certain items manufactured by the other and *vice versa.*

The Commission found two relevant lines of commerce. First, it excluded from its consideration of the products manufactured by both companies all the lowest-price items not usable in serious athletic play: these were the toy, or non-playable items sold for children and not adapted for hard use. The remaining types were considered as higher-price or playable goods, and within each of these categories—baseballs, footballs, softballs, etc.—the Commission found that Spalding had achieved market shares which gave it a concentration of the prohibited magnitude. The hearing examiner had treated a number of graduated price brackets as separate lines, but the theory

of violation adopted by the Commission was that while there might be cross-elasticity of demand among the higher-priced athletic goods, there was such a cleavage between the lowest-priced, nonplayable items and the items designed for serious use.

The other relevant line of commerce found by the Commission was that of athletic goods in general. This broad classification is justified on the ground that the four big general-line members of the industry carried similar miscellanies of products; each had its own well-established trade mark or marks, and the reputation and acceptance of each company's merchandise among the public gave it an advantage in the promotion of all types of athletic goods. Thus the company which is well established as a source of quality and satisfaction in the equipment for games W, X, and Y, will have an advantage when it offers its equipment for game Z under its known trade mark.

The Spalding company attacked the dual line of commerce finding as illogical, but the Commission's approach was squarely supported by the decision in *U. S.* v. *Bethlehem Steel Corp.,* 168 U. S. 576 (S. D. N. Y. 1958), where it was held that a relevant product line may be subdivided into other relevant product lines.

In working on the court appeals of Federal Trade Commission orders we have found that, to a degree, the judicially declared concepts of "peculiar uses and characteristics", "cross-elasticity of demand" and "effective area of competition" are helpful. But as the three cases I have briefly discussed demonstrate, the problem of the relevant market cannot be solved by resort to hornbook maxims or court dicta. Each calls for its own special *ad hoc* study.

THE ANATOMY OF A MERGER

by

HARRISON F. HOUGHTON*

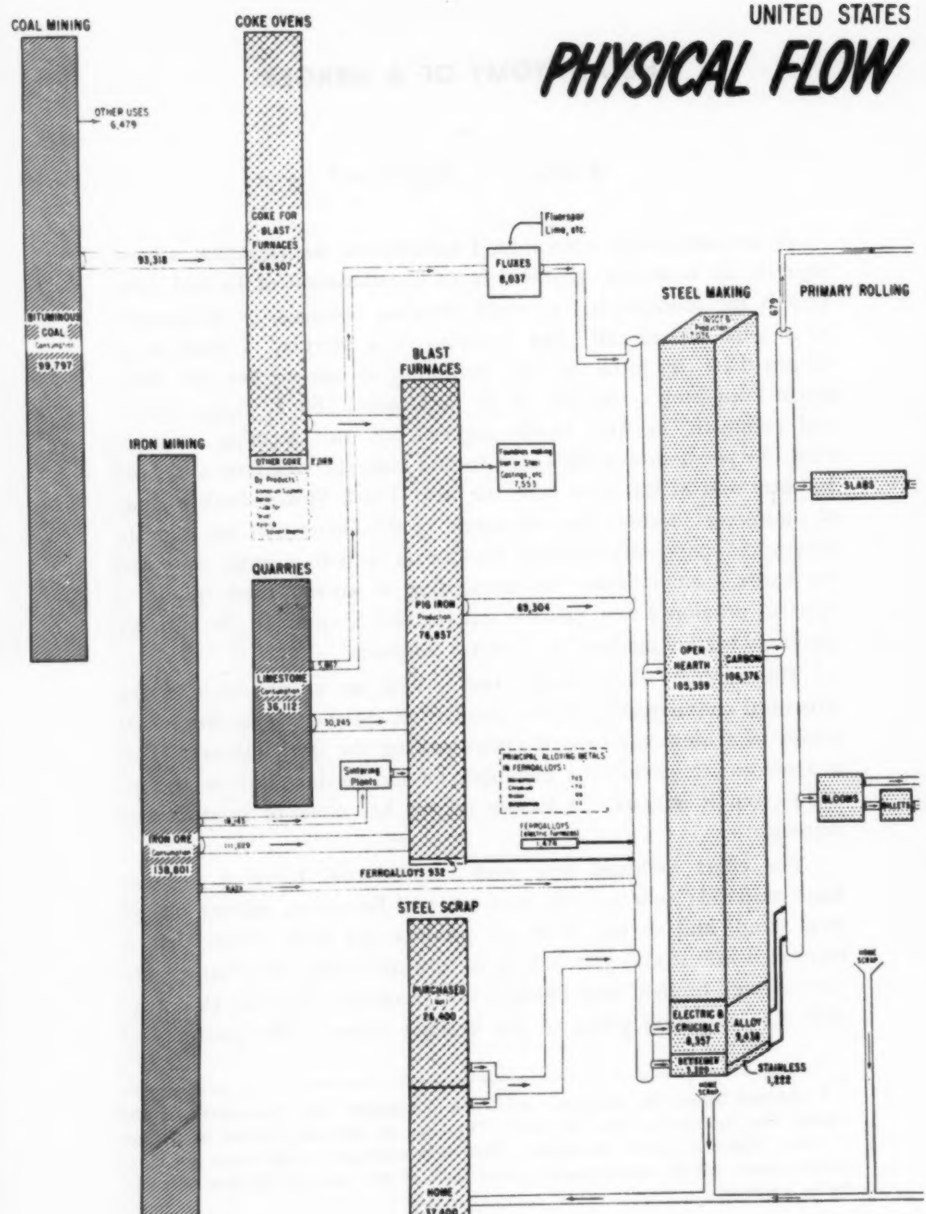
As an institutional economist, I subscribe to the view that a basic requisite for economic appraisal is an accumulation of factual data. This is the foundation for sound theories, opinions, or judgments. So in what I shall call "The Anatomy of a Merger," I shall try to do just that: set forth the facts pertaining to one merger—the Bethlehem-Youngstown case [*U. S.* v. *Bethlehem,* 168 F. Supp. 576]—and comment, as Mr. Jacobs suggests, on two seeming enigmas. First, the persuasion of the Court to find both the vast Iron and Steel Industry and at the same time the item Track Spikes—both as lines of commerce. Second, the conclusion of the Court that the relevant geographic market for identical lines could be both a single state and the entire United States. In attempting to answer these queries I hope to develop a few general criteria which apply to the broader canvas of market analysis for antitrust purposes.

The anatomy of a merger begins with an examination of the structural characteristics of the industry in question. Our first chart moves us a long way toward understanding the steel industry. This is a mosaic, to modify the metaphor, of the product flow in the industry, but it is more. It focuses on the key areas of product and demand.

The chart indicates how steel is produced, bringing together basic materials such as coal, iron ore and limestone, adding bits of steel scrap, and so on. First we produce pig iron. Then that is converted into steel ingots, which in turn are rolled and shaped into various semi-finished and finished steel products. It is at this stage that the marketing phase of the business enters. The products of

* Address before the Antitrust and Trade Regulation Law Committee of the Federal Bar Association, May 23, 1961: "Proving the Relevant Market in Section 7 Cases," Ephraim Jacobs, Moderator. The views expressed in this paper are those of the writer, and do not necessarily reflect those of the Antitrust Division in which he is employed.

UNITED STATES
PHYSICAL FLOW



1/ Including 247,000 tons of steel for castings made by ingot producers
2/ Includes blooms, billets, slabs, sheet bars, and seamless tube rounds shipped outside the industry.
3/ Coils for cold reduced black plate and tin plate.
4/ For seamless tubing.

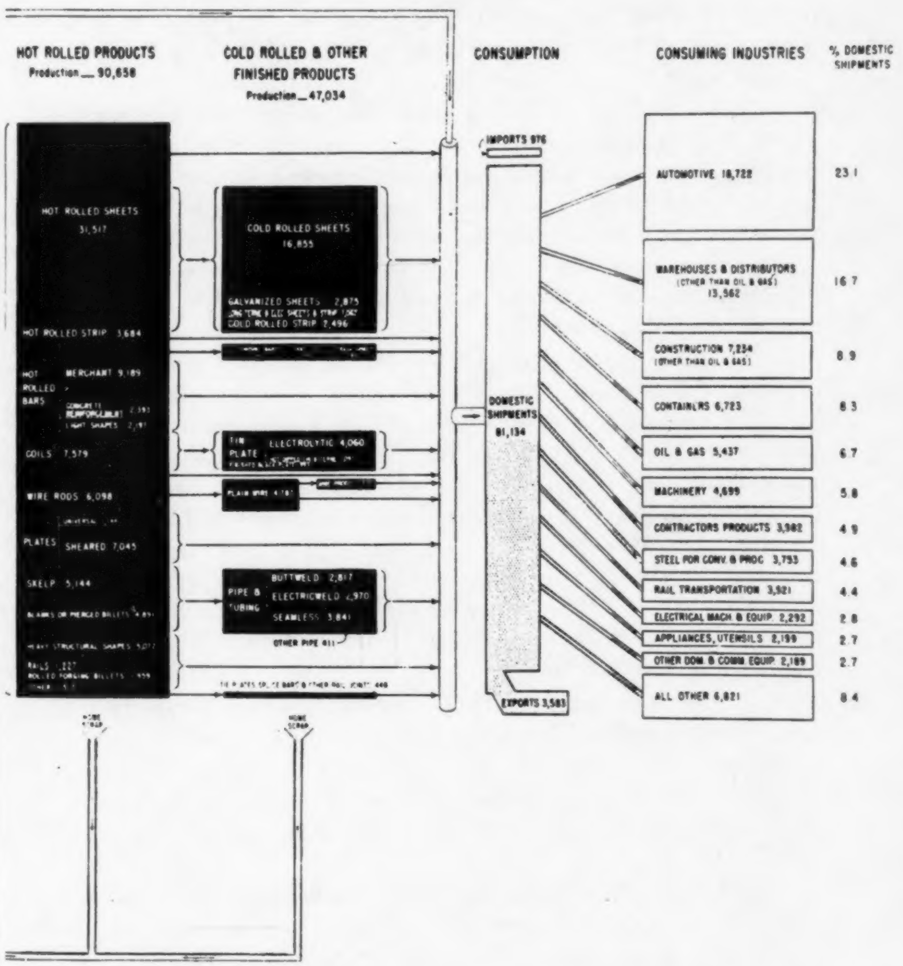
Source: Annual Statistical Report, American Iron and Steel Institute, (Report #12, 1953)

Chart 1

IRON AND STEEL INDUSTRY

FROM RAW MATERIALS TO FINISHED PRODUCTS, 1955

(Thousands of Net Tons)



the steel mills may be sent to market as hot rolled items, or carried further and cold rolled or otherwise finished before sold. At the far right of the chart the major consuming industries are listed—led by the automotive industry.

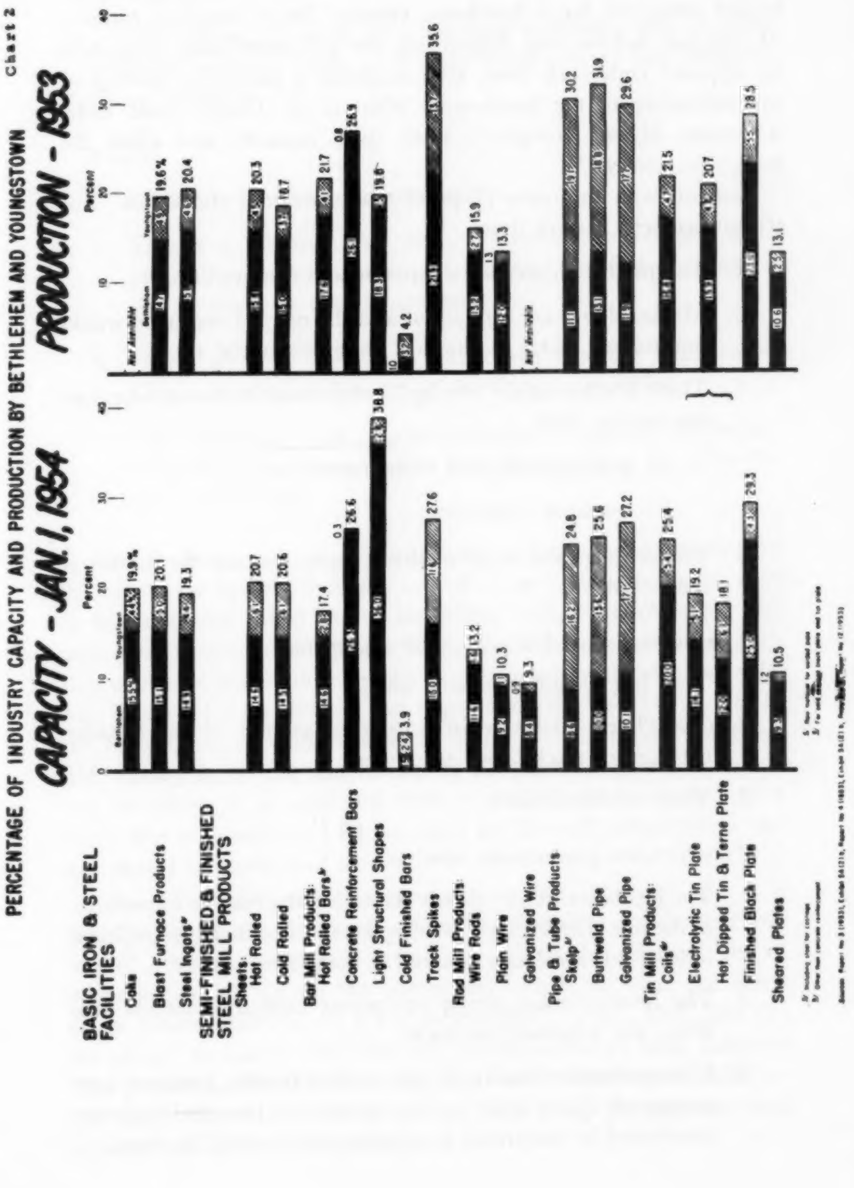
Now where do we find track spikes? If you look closely under the heading "Cold Rolled & Other Finished Products," down to the second block of entries, over to the right you find it. Actually, to get track spikes in, it was necessary to combine the product with two others. Otherwise you wouldn't be able to find track spikes on this huge chart.

In perspective, the tonnage of track spikes shipped amounted to 93,000 tons. This represents about .08% when related to the 117 million tons of ingots turned out by the industry. Experience has taught that judges and lawyers can comprehend nothing so well as dollars, so if we convert these figures into monetary equivalents we find that annual billings of the steel industry totalled $14 billion. Sales of track spikes reached about $15 million, or about .1%. Better, but not especially earth shaking.

What are the redeeming qualities of track spikes? The second chart suggests an answer. If you examine the right-hand portion of the chart and search for the product with the largest market share, what do you find? Why track spikes, of course. Bethlehem and Youngstown combined account for over 35%. By a substantial margin this tops any of the other product categories and is considerably higher than the total iron and steel industry share (as represented by blast furnace products and steel ingots) of 20%. Moreover, the shares of the track spike business enjoyed by our two erstwhile antagonists are fairly evenly divided—Bethlehem has nearly 22%, Youngstown almost 14%.

This then is the setting. On the one hand, we could take the "anatomical" approach, considering the industry as a whole, and resting our case on the large volume products. Or we could take what we might call the "Achilles Heel" attack, which says: "Pick the area where the merger is most vulnerable. Stick 'em with a track spike."

The "Achilles Heel" has a number of attractions. The product is easily distinguishable. It comes in a narrow range of sizes. One man's spikes is about the same as another's, etc. It presents no



PERCENTAGE OF INDUSTRY CAPACITY AND PRODUCTION BY BETHLEHEM AND YOUNGSTOWN
Chart 2
CAPACITY - JAN. 1, 1954
PRODUCTION - 1953
Percent
Bethlehem
Youngstown
Not Available
BASIC IRON & STEEL FACILITIES
Coke
Blast Furnace Products
Steel Ingots
SEMI-FINISHED & FINISHED STEEL MILL PRODUCTS
Sheets:
Hot Rolled
Cold Rolled
Bar Mill Products:
Hot Rolled Bars
Concrete Reinforcement Bars
Light Structural Shapes
Cold Finished Bars
Track Spikes
Rod Mill Products:
Wire Rods
Plain Wire
Galvanized Wire
Pipe & Tube Products:
Skelp
Buttweld Pipe
Galvanized Pipe
Tin Mill Products:
Coils
Electrolytic Tin Plate
Hot Dipped Tin & Terne Plate
Finished Black Plate
Sheared Plates

problem of qualities and gages, or shapes and forms. Track spikes looked attractive for a knock-out victory. But a word of caution. Maybe this Achilles was dipped into the well more than once, held by opposite ends each time, thus receiving a protective coating of invulnerability to the knock-out. What if the Court would order divestiture of one company's track spike capacity and allow the merger to proceed?

But on with the order of proof that convinced the Court. For the government it went thus:

1. The product represents a separate and distinct line.
2. Market shares are substantial and the merged company would outrank all others in the field by a substantial margin.
3. There is substantial "overlap" competition between the merging parties, both
   (a) geographical, and with respect to
   (b) common customers.
4. The geographical scope of this competition and the market is nationwide.

The defense moved in with these arguments:

1. The "line" is infinitesimally small.
2. The "line" dilutes when considered as part of the broader category of track fitting equipment.
3. There is ease of entry.

To which the government rebutted:

1. The legislative history clearly states that the relative importance of the line is irrelevant. Track spikes is economically significant; indeed, it is absolutely essential to the railroad industry.
2. The broader track fitting equipment category contains auxiliary, not substitute products.
3. History shows virtually no new entry; market positions have persistently been held by the leaders in the steel industry, dominated by integrated companies, not by small business.

Sur-rebuttal:

> No barrier to entry by consuming railroads; cost of spike making machines small; such entry could prevent any enhancement of prices.

Reply:

1. No record of such attempted entry.
2. This is a Sherman Act test. Government need not show power over price, but only a substantial lessening of competition or tendency toward monopoly.

So, along with 11 other lines, the Court found a violation in track spikes, without covering any of the details, remarking:

> It would be a work of supererogation to consider the impact of the merger in each and every relevant market as found by the Court. [*Ibid.,* 603]

The Opinion with great clarity spells out the factors leading to the conclusion that the industry, as well as the volume products, such as hot and cold rolled sheets, hot rolled bars, buttweld pipe, etc. individually constituted separate lines. But to an economist of particular interest is the emphasis the Court placed on the demand side. Mr. Bromely for the defense had urged upon the Court a variant of the ease of entry approach, what he called a "mill product theory." This theory urges that the totality of all products rolled, or which can be rolled, in a particular type of mill should be treated as a single line of commerce. Rather than hot or cold rolled sheets, the line should be sheets and strip.

The Court dismissed this argument on two grounds: (1) it is based solely on the theory of production flexibility and ignores factors of demand. As the Court stated: "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." [*Ibid.,* 592] But (2) the alleged production flexibility was not grounded on fact. Different mills produce cold rolled sheets than hot rolled sheets; the facilities are not interchangeable. Apparently the Judge's trip through the steel mills convinced him of this fact.

Now, turning to Eph's second question: How could the Court find a violation both in an area as small as the State of Michigan and as broad as the entire United States?

The answer lies in what I like to call the "Heart of the Market" approach. First a couple of facts: (1) As we've noted, the automobile industry ranks at the top of the steel consuming industries. (2) As everyone knows, auto production centers in Detroit, fanning out into the Ohio Valley. (3) The leading steel products used by the auto industry are hot rolled sheets, cold rolled sheets, and hot rolled bars. So any significant steel companies engaged in these lines —as most are—must look to Detroit for the lion's share of the market.

The evidence established that Detroit is supplied from steel mills located in a wide arc extending from Chicago to the Atlantic Seaboard. All of Bethlehem's and Youngstown's major plants are located within this arc, and all shipped sizeable quantities to the Detroit area. Most steel mills absorb freight to enter the Detroit market. The defendants acknowledged that Detroit was a large and significant enough consuming area to be considered a separate market.

Our final chart suggests how the market fans out from its heart in Detroit to encompass the whole country. Michigan, alone, as the cross hatched columns in the center of the chart indicate, is the market for 18% of total steel shipments. Add Ohio and you get nearly one-third of the total. Extend the market to embrace also New York and Pennsylvania and you have covered nearly half of the U. S. market. Extend the area further to cover the "Arc of Supply" for Detroit and you have 83% of the U. S. consumption. This is the area the Court dubbed the northeast quadrant.

Judge Weinfeld concluded that—

> An economically significant area in an industry cannot be determined with the precision of a surveyor. In considering the anti-competitive consequences of a merger there is nothing sacred about the boundary lines of a state. The impact may manifest itself in an appreciable segment of a market which may coincide with a political subdivision of a state, a state, or a combination of states or the nation. [*Ibid.*, 602]

The Court saw no reason for separating the northeast quadrant from the remaining 27 states which consume but 17% of the steel.

His reasons were as follows: (1) the competitive standards in all other consuming centers are so dependent on, and influenced by, what happens in the dominant northeast quadrant that they should be analyzed together; (2) while to some extent there are regional markets for steel products, they are all inter-related; prices, and supply and demand factors are common influences throughout all markets; and (3) "Finally, and perhaps the most significant of all the factors . . . throughout the nation both Bethlehem and Youngstown are substantial alternative sources of supply for buyers accounting for a substantial share of the total demand for steel products." [*Ibid.,* 601] This final point is illustrated by the left portion of the chart (showing market shares) and the right portion (showing destination of Bethlehem and Youngstown shipments).[1]

In choice of relevant geographic market the defendants again had taken a stand in terms of the supply side—first, in dividing the

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1 Professor Adelman has issued his dissent to Judge Weinfeld's findings. "This confusion between the legal standard and the economic fact is writ large in the Bethlehem Steel opinion, which designates as the geographic market in steel products the northeast quadrant of the United States, then also a three-state area [sic] within it, and then also each individual state: Ohio, Michigan, and Pennsylvania. This sinks below error into chaos. If the northeast quadrant is a market area—is the locus of the supply-demand forces that determine the price—then the other two areas are not. The evidence that sustains any one of the three market concepts necessarily condemns the others. Until there is a retreat from Bethlehem to reason, tribunals will be able to decide according to any visceral whim, by manipulating market definitions." (References omitted M. A. Adelman, "The Antimerger Act, 1950-60," American Economic Review Vol. LI, Number 2, May, 1961, p. 237.)

Passing over Professor Adelman's error in identifying the specific sections of the country found relevant by the Court, Adelman is finding a dichotomy without a difference, and seems to argue that market areas take on a Gestalt configuration whereby the total is not made up of the sum of the parts. The Michigan market is not only not insulated, but as the largest single destination for steel shipments, the center of the automobile industry, the largest industrial market for steel products and particularly the largest volume products, hot and cold rolled sheets and hot rolled bars, certainly contributes significantly to "the determination of price." With 18% (see chart) Michigan may well constitute a Clayton Act "tendency toward" a Sherman Act magnitude represented by the northeast quadrant (83%), in "the determination of price." But the Court did not require such a "test," being satisfied with three standards: (1) each state or combination of states represented an appreciable segment of the iron and steel market; (2) market shares were substantial; and (3) the areas were significant destinations for defendants' sales. Indeed, one wonders at the relevance of the Adelman test, in view of the Court's finding that "[t]here is no real price competition in the iron and steel industry" [op. cit., 587].

country into three parts based on the location of plants, and second by standing on the so-called "natural market" of each steel mill, and arguing that beyond such natural markets the mills were not effective competitors (presumably because they had to absorb freight to reach such markets).[2] The government, on the other hand, urged that the facts of demand, as shown in actual shipments, truly described the market.

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[2] The Court observed: "But these theoretical concepts must yield to the facts which have persisted in this industry through the years and reflect an industry pattern. . . . Thus the obstacles claimed by the defendants, whether they be called natural barriers, freight barriers, or whatever the burden, have been successfully hurdled" [op. cit., 599].

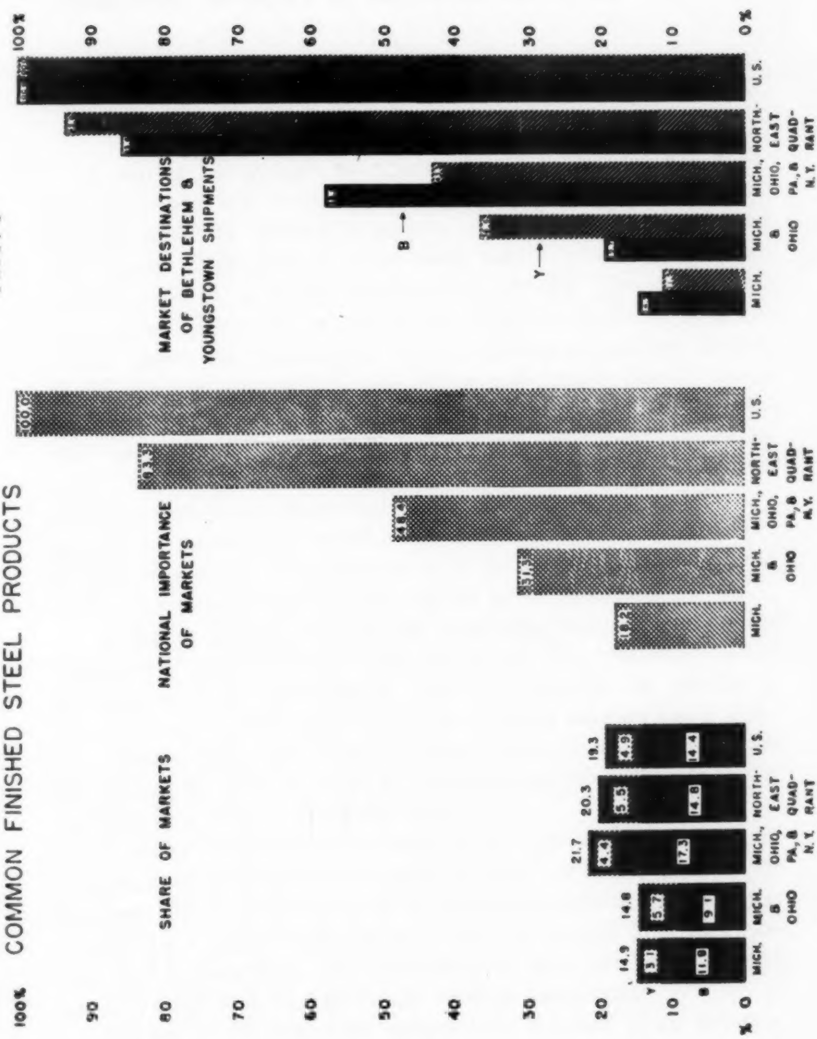

Chart 3

COMMON FINISHED STEEL PRODUCTS

THE ROLE OF AN ECONOMIST IN DELINEATING THE RELEVANT MARKET IN AN ANTITRUST PROCEEDING

by

FRANK J. KOTTKE

A market has at least two dimensions; frequently it has three. Obviously there is a product dimension. In a particular instance our problem might be whether to address our attention to the demand and supply of doughnuts, or of fresh bakery products, or of all bakery products, or of all ready-to-eat foodstuffs. The market also has a geographical dimension—in the doughnut instance, is it the Statler Hotel, the Washington, D. C., downtown business district, the Washington metropolitan area, or the mid-Atlantic States? Sometimes the market has a functional dimension. For example, the relevant transactions may be those between manufacturers and wholesalers. In another situation, the relevant transactions may be those between retailers and individual consumers, such as you and I. Frequently it is necessary to establish the boundaries of each of a market's various dimensions. Our problem is to do this quickly, surely, and with a minimum of trouble and expense to all concerned.

So far as possible, we rely on preexisting records, and on the testimony of persons familiar with the trade. The complexity of the problem, and the documentary resources available for solving it, vary from one market to the next. An antitrust attorney has a problem somewhat like that of an American Indian hunting game. Like the Indian, he must be adept at discerning the relatively few bits of evidence in a forest of irrelevant facts.

If market situations are not alike, neither are attorneys. Some attorneys have participated in many inquiries of this sort, and are familiar with the industry currently under investigation. Unless there is need for a special study, an economist can supply little they cannot do for themselves. But relatively few attorneys have this very special background for a particular antitrust assignment.

Neither are all economists equipped for this kind of an investigation. An economist may have an enviable record in business cycle analysis or economic development, to name two prominent specialties,

without having acquired any background or skills useful in illuminating the issues of an antitrust proceeding. My remarks on economists tonight are limited to economists with relevant training and experience.

Where a market's boundaries are in doubt, most attorneys will find that such economists can be helpful. They can contribute to an attorney's own inquiry precisely because their background differs from that of an attorney. Their training makes them continually conscious of the web of relationships between firms, and conscious also of the imperatives in the positions of individual companies. Their training makes them quick to recognize where the breadth of a market is changing. They are as relieved as anyone else where, on a particular matter, they find cleancut distinctions, as between black and white, but they are also equipped to reason about a set of facts that exhibit many shades of gray.

To be more specific, an economist can assist in rephrasing the factual issues as a series of subquestions, each of which is susceptible of proof. An economist can assist in identifying relevant documentary material and in suggesting places to seek additional information. An economist can call attention to developments which run counter to counsel's theories. The market may be growing wider, for example, because reductions in costs of manufacture have brought a new substitute into active competition with traditional materials; conversely, the market may be narrowing because quality improvements in the relevant product are eliminating erstwhile substitutes.

An economist is alert for evidence of what firms in general are doing. He is interested in how far afield salesmen range in seeking customers, and whether in distant territories they solicit only a limited type of business. He is interested in the location and character of new investments. Where higgling between buyers and sellers sets the prices of various alleged substitutes, the economist will be alert for information on the timing and direction of price changes.

To sum up, in situations where the breadth of a market promises to be an issue, and the attorneys on the brief are not intimately familiar with the businesses involved, a qualified economist can assist attorneys in planning the investigation and in interpreting what the investigation uncovers—the data, the documents, and the trade opinions.

THE APPLICATION OF THE U. S. ANTITRUST LAWS TO THE EUROPEAN COMMUNITY

by

JERROLD G. VAN CISE*

The American businessman who returns to the home of his European forefathers, much like Naomi of the Old Testament, does not travel alone. Wither he goes, our antitrust laws go; and where he lodges, these laws also lodge.

The laws which accompany the American businessman to the land of his ancestors, however, are more numerous than the solitary companion of the *Book of Ruth*. The principal statutes in his legislative train are the Sherman,[1] Clayton,[2] Robinson-Patman,[3] and Federal Trade Commission[4] acts; but other such acts include the Wilson[5] and 1930[6] Tariff Acts, the Revenue Act of 1916[7] and the Webb-Pomerene Act.[8] These laws, moreover, seldom emulate Ruth in

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* MR. VAN CISE, Firm of Cahill, Gordon, Reindel & Ohl, New York, N. Y.

ED. NOTE: Reprinted from 1960 INSTITUTE ON LEGAL ASPECTS OF THE EUROPEAN COMMUNITY, published by The Federal Bar Association, Washington, D. C.

1 Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U. S. C., §§ 1-8 (1958).

2 Clayton Antitrust Act, 38 Stat. 730 (1914), as amended, 15 U. S. C. A., §§ 12-27 (1959), 29 U. S. C. § 52 (1958).

3 Price Discrimination (Robinson-Patman) Act, 49 Stat. 1526 (1936), 15 U. S. C., §§ 13, 13a, 13b, 21a (1958).

4 Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U. S. C., §§ 41-51 (1958); 52 Stat. 111 (1938), 15 U. S. C., §§ 41, 44, 45 (1958); 66 Stat. 632 (1952), 15 U. S. C., § 45 (1958).

5 Wilson Tariff Act, 28 Stat. 570 (1894), as amended, 15 U. S. C., §§ 8-11 (1958).

6 Tariff Act of 1930, 46 Stat. 590, as amended, 19 U. S. C., §§ 1304, 1337, 1351 (1958).

7 Revenue Act of 1916, 39 Stat. 798, 15 U. S. C., §§ 71-74 (1958).

8 Webb Export Trade Associations (Webb-Pomerene) Act, 40 Stat. 516 (1918), as amended, 15 U. S. C., §§ 61-65 (1958).

helping to glean at the foreign harvest. At times, rather, they are responsible for substantial problems in his overseas operations.

The assignment of this scribe is to review the legal problems which are raised when the American thus ventures abroad with his numerous antitrust escorts and seeks to do business in the European Community. This paper accordingly will first take up three typical activities of such a businessman, namely, those of a distributor, those of a licensor and those of an investor, and will describe, in connection with each, the extent to which these laws raise legal problems. It will next explain how the role of the businessman as a visitor on foreign soil complicates these problems. Finally, it will conclude with a candid plea for caution on the part of courts and prosecutors in their future proceedings against this overseas businessman.

Distributor

U. S. Restraint

The American who does business as a distributor of commodities in the European Community has no problems with our antitrust laws until he engages, to some degree, in a restraint of the trade and commerce of the United States.

If he merely buys and sells in the European Common Market he may ignore these laws. For our statutes assume that the export and import of commodities is both possible and desirable,[9] and they permit, therefore, all necessary commercial procedures in buying and selling, consistent with fair competition, to promote such an overseas business. As explained in one of the opinions in the *United States Steel* case:

> "To hold otherwise would be practically and commercially, to enjoin the * * * trade of the United States from using the business methods which are necessary in order to build up and maintain a dependable business abroad * * *"[10]

If he engages in a restraint of some trade other than that of the United States, moreover, he may also disregard these laws. Congress

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[9] *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 599 (1951).

[10] *U. S.* v. *U. S. Steel Corp.*, 213 Fed. 55, 114 (D. C. N. J. 1915) aff'd, 251 U. S. 417 (1920).

has not sought to regulate conduct which takes place in and concerns only other nations.[11] It has recognized that it is not entitled to protect foreign consumers.[12] The courts have therefore ruled that our antitrust laws are not intended:

> "* * * to punish all whom its courts can catch, for conduct which has no consequences within the United States." [13]

The only antitrust concern that a distributor need have for his totally foreign restraints is that such conduct might be admissible in evidence, on some theory, in antitrust litigation concerning other transactions.[14]

Substantial Restraint

The American businessman who does engage in some restraint of the trade and commerce of this country, as distributor in the European Community, may still view lightly our antitrust laws, so long as his restraints do not directly and substantially affect this trade and commerce.

The Government prosecutor, as a practical matter, is reluctant to activate these laws against foreign conduct unless he believes that some major restraint of United States trade and commerce is involved.[15] The limited funds allocated to antitrust enforcement do not encourage overseas "frolics and detours." Indeed, the Department of Justice has often disclaimed any interest in mere incidental restraints only indirectly affecting our economy. Thus it has declined in its consent judgments to enjoin restrictions upon the use of U. S. produced equipment in foreign areas,[16] and has even overlooked the fixing of prices of foreign produced commodities in

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11 *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909).

12 *Branch* v. *FTC*, 141 F. 2d 31, 35 (2d Cir. 1944).

13 *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

14 *Bausch Machine Tool Co.* v. *Aluminum Co.*, 72 F. 2d 236 (2d Cir. 1954).

15 See, e.g., Fugate, *Foreign Commerce and the Antitrust Laws* (1958), pp. 54-55.

16 *U. S.* v. *Decca Records, Inc.*, CCH 1952-53 Trade Cases Par. 67,402, § V(C) (S. D. N. Y. 1952).

foreign sales.[17] Our prosecuting agencies recognize that any unnecessary attempts to extend the application of our antitrust laws might disturb a variety of Government interests including friendly relations with foreign governments:

> "The Department of Justice is quite sensitive to these interests, and to our foreign relations. We feel that it is our job to know what these interests are, and to carefully weigh them before any action is taken." [18]

The courts, similarly, are hesitant to extend unnecessarily our antitrust statutes to the internal economy of friendly nations. Certain of these statutes on their face indicate a Congressional intent to limit their extraterritorial application to restraints of import trade directly affecting our domestic commerce.[19] Others reveal a Congressional objective to emphasize their extraterritorial application to restraints of imports[20] and exports[21] when domestic prices are affected. But even the more general of these statutes, according to the courts, embody a Congressional purpose not to reach conduct which restrains only incidentally the interstate and foreign commerce of this country.[22]

> "Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one

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17 *U. S.* v. *Hughes Tool Co.*, CCH 1958 Trade Cases Par. 69,001, § IV(D) (S. D. N. Y. 1958).

18 Hansen, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 A. B. A. Antitrust Section Report 75, 76 (1957).

19 See, e.g., §§ 3 and 7 of the Clayton Act, 38 Stat. 731 (1914), as amended; 15 U. S. C. §§ 14, 18 (1958); § 2(a) of the Robinson-Patman Act, 49 Stat. 1526; 15 U. S. C. § 13 (1958); the Revenue Act of 1916, 39 Stat. 798; 15 U. S. C. §§ 71-74 (1958); and the Tariff Act of 1930, 46 Stat. 590, as amended; 19 U. S. C. §§ 1304, 1337, 1351 (1958).

20 Wilson Tariff Act, 28 Stat. 570 (1894), as amended; 15 U. S. C., §§ 8-11 (1958).

21 Webb Export Trade Associations Act, 40 Stat. 516 (1918), as amended; 15 U. S. C., §§ 61-65 (1958).

22 See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234 (1948); *U. S.* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297 (1945).

considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. * * *"[23]

The limitation of the application of our antitrust laws to foreign restraints which affect to a material degree our trade and commerce has been said to refer to the quality of the restraint and not to the quantum of the business involved.[24] This statement, however, is misleading. Unless an appreciable volume of overseas business is involved there can be no restraint of competition arising to the dignity of a restraint of trade, and unless a substantial volume of such business is affected there can be no direct effect arising from such a restraint upon U. S. trade. It is conceded by all that, before our antitrust laws apply:

"* * * there must be a *direct* and *substantial* effect on [U. S.] foreign commerce."[25]

Unreasonable Restraint

The American distributor who buys and sells in the European Common Market indeed may not only restrain, but may even substantially restrain, the trade and commerce of this country, where such a restraint is reasonably necessary to the conduct of this foreign commerce.

For example, the Department of Justice and the courts have repeatedly recognized that foreign restraints required by foreign governments for doing business in foreign countries do not violate our antitrust laws. The consent decrees of the former[26] and the judgments of

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[23] *U. S.* v. *Aluminum Company of America*, 148 F. 2d 416 (1945).

[24] *U. S.* v. *U. S. Alkali Export Ass'n Inc.*, 86 F. Supp. 59, 80 (S. D. N. Y. 1949); *U. S.* v. *Bayer Co.*, 135 F. Supp. 65 (S. D. N. Y. 1955).

[25] Fugate, *Foreign Commerce and the Antitrust Laws* (1958), p. 126.

[26] *U. S.* v. *American Smelting & Refining Co.*, CCH 1957 Trade Cases Par. 68,836, § VI (S. D. N. Y. 1957); *U. S.* v. *United Fruit Co.*, CCH 1958 Trade Cases Par. 68,941, § VII (D. C. La. 1958); and *U. S.* v. *American Type Founders Co., Inc.*, CCH 1958 Trade Cases Par. 69,065, § VIII (D. C. N. J. 1958).

the latter[27] have emphasized that our laws do not insist unreasonably upon violation abroad of the rules and regulations which control abroad. When a sovereign in government, whether state or nation, imposes a restraint, it does so:

> "* * * as an act of government which the Sherman Act did not undertake to prohibit * * *" [28]

Likewise, the Department and the courts have conceded that restraints essential to the conduct of a competitive overseas business are permissible. Thus the grant of exclusive rights,[29] limited restraints upon the use of property[30] and covenants not to compete where ancillary to a sale,[31] have been permitted. Indeed, even restraints that resemble *per se* violations of our antitrust laws would seem to be lawful, if the special problems of conducting a competitive foreign business justify those restraints. For such restraints upon domestic commerce have received judicial sanction where essential for the conduct of a particular competitive business,[32] and there is no reason to believe that such a result would not be reached in foreign commerce. In short, our antitrust laws are said not to:

> "* * * forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. * * *" [33]

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27 *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909); *U. S.* v. *General Electric Co.*, 115 F. Supp. 835 (D. C. N. J. 1953).

28 *Parker* v. *Brown*, 317 U. S. 341, 352 (1943).

29 *U. S.* v. *Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 244 (S. D. N. Y. 1952); *U. S.* v. *Schering Corp.*, CCH 1940-43 Trade Cases Par. 56,179, § II(3); cf. *U. S.* v. *Necchi Sewing Machine Sales Corp.*, CCH 1958 Trade Cases Par. 68,957, § VII (S. D. N. Y. 1958).

30 *Tri-Continental Financial Corp.* v. *Tropical Marine Enterprises, Inc.*, CCH 1959 Trade Cases Par. 69,326 (5th Cir. 1959); *P. Lorillard Co.* v. *Weingarden*, 280 Fed. 238 (W. D. N. Y. 1922).

31 *Thomas* v. *Sutherland*, 52 F. 2d 592 (3d Cir. 1931); *U. S.* v. *American Type Founders Co., Inc.*, CCH 1958 Trade Cases Par. 69,065, § VIII(c) (D. C. N. J. 1958).

32 E.g. *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594 (1953); *U. S.* v. *Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953).

33 *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911).

A restraint may not be justified as reasonably necessary within this second category of cases, however, by the mere fact that such restraints are customary abroad. A restraint to be so viewed under the antitrust laws must be reasonably necessary to encourage—rather than discourage—competition. Thus in the *National Lead* case the court emphatically rejected the argument:

> "* * * that American producers cannot do business successfully in a cartelized world except on cartel terms; and that, to abstain from such business would amount to a greater restraint on trade than is involved in joining the cartel; * * *" [34]

Unlawful Restraint

The American who engages as a distributor in the European Common Market does however violate our antitrust laws when his conduct rises to the dignity of: (1) a restraint of United States commerce; (2) which is direct and substantial; and (3) which is unreasonable.

The foreign forum of the overt act is then irrelevant. As summarized in the Report of the Attorney General's National Committee to Study the Antitrust Laws:

> "We feel that the Sherman Act applies * * * to these arrangements between Americans alone, or in concert with foreign firms, which have such substantial anti-competitive effects on this country's 'trade or commerce * * * with foreign nations' as to constitute unreasonable restraints." [35]

Thus the individual practices of an overseas company in buying and selling may be vulnerable if they constitute unfair competition substantially injurious to exporters from[36] or importers to[37] the United States, proscribed price discrimination in imports to competing cus-

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[34] *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, 525 (S. D. N. Y. 1945).

[35] Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 76. Also, compare *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909) with *Sanib* v. *United Fruit Co.*, 135 F. Supp. 764 (S. D. N. Y. 1955).

[36] *Branch* v. *FTC*, 141 F. 2d 31 (2d Cir. 1944).

[37] *Eastman Kodak Co.* v. *FTC*, 7 F. 2d 994 (2d Cir. 1925), aff'd 274 U. S. 619 (1927).

tomers in the United States,[38] or some act clearly singled out for *per se* statutory prohibition.[39] These are both unreasonable and substantial restraints of U. S. commerce and thus are reached by our laws:

> "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States." [40]

Again, collective agreements of an American businessman abroad with his competitors to fix prices,[41] divide territory[42] or boycott third parties[43] in a manner directly and substantially restraining United States commerce, in the absence of some affirmative justification such as express statutory authorization for such conduct,[44] are unlawful. These also are major restraints of our commerce which are traditionally viewed to be unreasonable whether originating here or abroad:

> "The decisions under the Sherman Act leave no doubt that all contracts, combinations, and conspiracies aimed at obstructing the foreign commerce of the United States come within the broad prohibitions of the antitrust laws." [45]

Finally, attempts to monopolize any line of foreign commerce with this country, whether such attempt involves a commodity[46] or a service[47] are proscribed. This prohibition applies as readily to arrange-

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38 Speech delivered Jan. 6, 1960, by Chairman Earl W. Kintner of the Federal Trade Commission before the Floor Covering Association.

39 *Baysoy* v. *Jessop Steel Co.*, 90 F. Supp. 303 (W. D. Penn. 1950).

40 *Branch* v. *FTC*, 141 F. 2d 31, 34 (2d Cir. 1944); cf. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280 (1952).

41 *U. S.* v. *U. S. Alkali Export Ass'n Inc.*, 86 F. Supp. 59 (S. D. N. Y. 1949).

42 *U. S.* v. *Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945); *U. S.* v. *American Tobacco Co.*, 221 U. S. 106 (1911).

43 *U. S.* v. *Pacific & Arctic Ry. & Navigation Co.*, 228 U. S. 87 (1913).

44 Webb Export Trade Associations (Webb-Pomerene) Act, 40 Stat. 516 (1918), as amended, 15 U. S. C. §§61-65 (1958).

45 *U. S.* v. *U. S. Alkali Export Ass'n, Inc.*, 86 F. Supp. 59 (S. D. N. Y. 1949).

46 *U. S.* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927).

47 *Thomson* v. *Cayser*, 243 U. S. 66 (1917).

ments to control all available overseas sources of supply[48] as to more local practices such as the use of "fighting ships." [49] An American monopolist may be required to account for any such monopolization even where his objectives may to a limited degree be aided (as distinguished from required) by foreign law:

> "True, the conspirators were aided by discriminatory [foreign] legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." [50]

The American distributor who is followed abroad by our antitrust laws, in short, ordinarily will find these statutes to be patient and long suffering. They are aroused, however, when unreasonable, direct and substantial restraints of our trade are involved. In particular they spring into action when imports into the United States are adversely affected. At this point the American would be well advised, if foreign law permits, to refrain from doing abroad that which would be forbidden at home.

LICENSOR

U. S. Restraint

The American businessman who attempts to exploit his patents, trademarks and know-how in the European Community, as licensor, similarly need not defer to our antitrust laws until he engages in some restraint of the trade and commerce of the United States.

Should he merely license his intangible wares in defined areas of the European Common Market, he has little need to consider these laws. The affirmative grant of freedom to another is seldom considered to be an antitrust restraint. In the *Timken* case, for example, the District Court carefully noted that the licenses condemned in that case were not:

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48 *U. S.* v. *Eastman Kodak Co.*, 226 Fed. 62 (D. C. N. Y. 1915); cf. *U. S.* v. *United Fruit Co.*, CCH 1958 Trade Cases Par. 68,941 (D. C. La. 1958).

49 *Thomson* v. *Cayser*, 243 U. S. 66 (1917).

50 *U. S.* v. *Sisal Sales Corp.*, 274 U. S. 268, 276 (1927).

> "* * * merely patent licenses for the manufacture of tapered roller bearings in limited areas." [51]

Were he to engage in restraints in the course of licensing, he would still be free of antitrust danger so long as the trade affected is not that of the United States. Thus in a well known consent judgment, the Department expressly conceded the right of a licensor of a foreign manufacturer to restrict the use of the former's licensed know-how to a designated purpose and the sale of products made by such know-how to a designated area, provided that:

> "* * * the foreign manufacturer shall be free to use that know-how in the United States * * * and to sell * * * [the product] manufactured by use of that know-how in the interstate and foreign commerce of the United States." [52]

Substantial Restraint

The American licensor, likewise, need not be troubled by our antitrust laws so long as his restraints do not directly and substantially affect the trade and commerce of the United States.

The courts have ruled that a company licensing abroad is not subject to antitrust liability even when it engages in price-fixing and the restriction of output, provided that these restraints have only an incidental, peripheral reference to sales in the United States.[53] To apply our antitrust laws to such a licensor:

> "* * * its activities must have had a direct and substantial effect upon trade." [54]

An excellent analysis of the cases on this subject by an attorney with the Department of Justice concedes that:

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[51] *U. S.* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 306 (N. D. Ohio 1949), mod'd and aff'd 341 U. S. 593 (1951).

[52] *U. S.* v. *United Engineering & Foundry Co.*, CCH 1952-53 Trade Cases Par. 67,378 § VIII (D. C. Penn. 1952).

[53] *Alfred Bell & Co.* v. *Catalda*, CCH 1951-52 Trade Cases Par. 62,893 (2d Cir. 1951).

[54] *U. S.* v. *General Electric Co.*, 82 F. Supp. 753, 891 (D. C. N. J. 1949).

> "We do not have any cases specifically dealing with the right of a patentee, American or foreign, to fix prices in a foreign country under a foreign patent. Of course this question would not be raised at all in the absence of a substantial effect upon United States foreign trade." [55]

Unreasonable Restraint

The American licensor in the European Community, moreover, would not infringe our antitrust laws to the extent that his restraints were reasonably ancillary to engaging in the business of licensing abroad.

The courts have approved the grant of exclusive rights,[56] the exchange of exclusive licenses,[57] and on occasion even covenants not to import or export when such undertakings were reasonably limited in time, territory and scope.[58] Thus with respect to the licensing of trade secrets, it was recently affirmed that:

> "Among the ancillary restraints which are considered reasonable, both under common law and the Sherman Act, are those which limit territory in which the contracting parties may use the trade secret." [59]

Any such limited restraints in foreign licenses, however, are valid of course only to the extent that:

> " * * * there is a lawful main purpose to which the challenged * * * [restraint] is reasonably ancillary." [60]

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55 Fugate, *Foreign Commerce and the Antitrust Laws* (1958), p. 198.

56 *U. S.* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956).

57 *Foundry Services Inc.* v. *Beneflux Corp.*, 110 F. Supp. 857 (S. D. N. Y. 1953), rev'd on other grounds, 206 F. 2d 214 (2d Cir. 1953).

58 *Brownell* v. *Ketcham Wire & Mfg. Co.*, 211 F. 2d 121 (9th Cir. 1954); *Scapa Dryers, Inc.* v. *Abney Mills*, CCH 1959 Trade Cases Par. 69,392 (5th Cir. 1959); *Melard Mfg. Corp.* v. *Chase Brass & Copper Co., Inc.*, CCH 1959 Trade Cases Par. 69,595 (N. D. Ill. 1959); *U. S.* v. *L. D. Caulk Co.*, 126 F. Supp. 693 (D. C. Del. 1954).

59 *U. S.* v. *E. I. duPont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. C. Del. 1953), aff'd, 351 U. S. 377 (1956).

60 Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 86.

Unlawful Restraints

An American licensor whose license arrangements involve restraints of U. S. commerce which are direct, substantial and unreasonable, however, as in the case of comparable agreements of an American distributor, violates these laws.

An international licensor may not utilize patents, trademarks or know-how to justify unfair methods of competition, such as the piracy of trademarks, substantially affecting our trade and commerce. Our laws will reach him even where he operates primarily abroad, provided that personal service may be made upon him:

> "* * * the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." [61]

Such an international licensor, likewise, may not justify a naked conspiracy to fix prices,[62] to divide territory,[63] or to impose restraints upon third parties,[64] in license agreements substantially affecting U. S. commerce, by claiming that these arrangements are mere ancillary restraints incidental to the license agreements.[65] The courts have repeatedly so ruled with respect to patent,[66] trademark,[67] and know-how[68] licenses directly and substantially affecting United States trade and commerce. Thus the skillful use of exclusive cross licenses under present and future patents as a mere device to divide markets is as vulnerable as any other commercial division of territory by competing distributors.[69] The fact that these restraints may merely duplicate

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61 *Steele* v. *Bulova Watch Co.,* 344 U. S. 280, 289 (1952).

62 *U. S.* v. *General Electric Co.,* 80 F. Supp. 989 (S. D. N. Y. 1948).

63 *Holophane Co.* v. *U. S.,* 119 F. Supp. 114 and CCH 1954 Trade Cases Par. 67,679 (N. D. Ohio 1954), aff'd *per curiam,* 352 U. S. 903 (1956).

64 *U. S.* v. *National Lead Co.,* 332 U. S. 319 (1947).

65 *U. S.* v. *The Bayer Co.,* 135 F. Supp. 65 (S. D. N. Y. 1955).

66 *U. S.* v. *National Lead Co.,* 332 U. S. 319 (1947).

67 *Timken Roller Bearing Co.* v. *U. S.,* 341 U. S. 593 (1951).

68 *U. S.* v. *General Electric Co.,* 82 F. Supp. 753 (D. C. N. J. 1949).

69 *U. S.* v. *Imperial Chemical Industries, Ltd.,* 100 F. Supp. 504 (S. D. N. Y. 1951).

public restraints in the form of tariff and comparable regulations also does not necessarily justify them:

> "The second argument advanced by defendants is that the agreements * * * cannot be deemed to be against public policy because they serve the same purpose as the tariff acts. But the intention of Congress is quite unambiguous. It subjects the imports of foreign commodities to public control and regulation and prohibits such control and regulation by private combination * * *" [70]

An attempt to monopolize the trade of a major industry in our country by the international license route is, of course, equally vulnerable and subject to our laws. A patentee may lawfully enjoy a monopoly of a patented invention; but the utilization by a licensor of a network of exclusive cross licenses covering all patents in an industry, born and unborn, to dominate all trade and commerce in this industry is prohibited.[71]

The American licensor in short, may ignore our itinerant antitrust laws if overseas trade alone is affected. He may not, however, adopt licensing practices which directly, substantially and unreasonably restrain United States trade and commerce. In the latter event he must here also conform simultaneously both to foreign and to United States legislation.

Investor

U. S. Restraint

The American businessman who seeks to invest in the European Community faces much the same problems as one who deals solely in tangibles or intangibles.

At the outset, the American investor may forget our antitrust laws so long as he is content to play a passive role.

The policy of our Government—regardless of party—has been to encourage overseas investments.[72] It is:

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70 *U. S.* v. *General Dyestuff Corp.*, 57 F. Supp. 642, 649 (S. D. N. Y. 1944).

71 *U. S.* v. *General Electric Company*, 82 F. Supp. 753 (D. C. N. J. 1949).

72 President Truman's Inaugural Address of Jan. 20, 1949, and President Eisenhower's State of the Union Address of Feb. 2, 1953; see also citations in Fugate, *The Antitrust Laws and Foreign Investment*, 19 Federal Bar Journal 338 (1959).

> "* * * the announced policy of the United States to encourage American capital to invest abroad." [73]

Such a foreign investment may be made by the American businessman, accordingly, either in a competitive or in a non-competitive venture. The Department[74] and the courts[75] have left undisturbed the investments of American companies in foreign corporations, even where the parties were co-conspirators, so long as any use of such investments to restrain competition with these foreign corporations is avoided. This is in accord with the policy of Congress in the Clayton Act, where Congress on its part has expressly provided that the purchase of stock in a (domestic) competitor is not unlawful where the acquiring corporation is:

> "* * * purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or attempting to bring about, the substantial lessening of competition." [76]

An investment, *per se,* restrains nothing.

Substantial Restraint

The American investor who desires to play a more active role in the European Community may safely do so, moreover, so long as any effect upon United States trade and commerce is negligible.

Thus the American businessman may own and operate a plant abroad. This may curtail the flow of imports into the foreign market from the United States, but any such restraint is a minor incident to the importation of capital and technology into that market. Moreover, such action is the individual decision of a single company made

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73 *U. S.* v. *General Electric Company,* 115 F. Supp. 835, 875 (D. C. N. J. 1953).

74 *U. S.* v. *Electric Storage Battery Co.,* CCH 1946-47 Trade Cases Par. 57,645 (S. D. N. Y. 1947).

75 *Timken Roller Bearing Co.* v. *U. S.,* 341 U. S. 593 (1951); *U. S.* v. *General Electric Co.,* 115 F. Supp. 835 (D. C. N. J. 1953).

76 § 7 of the Clayton Act, 38 Stat. 731 (1914), as amended; 15 U. S. C., § 18 (1958).

for the purpose of maximizing competitive profits.[77] The antitrust laws nowhere prohibit:

> "* * * an American manufacturer seeking to make larger profits through the mere ownership and operation of a branch factory abroad which is not conducted as part of a combination, conspiracy or monopoly." [78]

Again, the American businessman may organize and operate an overseas subsidiary. He may own 100% of its stock,[79] or may permit others to hold a minority interest therein.[80] He may further dictate its prices and markets,[81] so long as the subsidiary is not a mere instrument utilized to perpetuate earlier unlawful agreements[82] or to mislead customers through concealment of the parent-subsidiary relationship.[83] It seems obvious that directions given by a parent cannot be lawful only when given to an unincorporated overseas division and become unlawful when sent to an incorporated overseas division. It appears clear, rather, that any restraint arising from such customary arrangements between a parent and its subsidiary is a restraint in form only, which likewise falls into the minor or incidental class not forbidden by our antitrust laws.[84] Injunctive provisions in consent judgments prohibiting agreements for the fixing of prices and the division of markets have repeatedly exempted transactions solely between parents

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77 See, e.g., concurrence of Government counsel quoted in the dissenting opinion by Mr. Justice Jackson in *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 606 (1951).

78 *U. S.* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 964 (D. C. Mass. 1950).

79 *U. S.* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. C. Mass. 1950).

80 *U. S.* v. *E. I. duPont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. C. Del. 1953), aff'd 351 U. S. 377 (1956).

81 Report of the Attorney General's Committee to Study the Antitrust Laws (1955), pp. 88-90.

82 *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593 (1951).

83 *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 215, rehearing denied 340 U. S. 939 (1951).

84 *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 523 (1948); *U. S.* v. *Arkansas Fuel Oil Corp.*, —F. Supp.— (N. D. Okla. 1960); Fugate, *Foreign Commerce and the Antitrust Laws* (1958) pp. 237-8, 240-1.

and subsidiaries.[85] Even the sweeping judgment in the *National Lead* case provided that its injunctive provisions directed against allocations of markets were not to prohibit:

> "* * * any normal and usual arrangements between any defendant and its directors, officers, employees, agents, subsidiaries." [86]

Also, the American investor may join with competitors to organize and operate a joint venture in markets reached with difficulty by American importers and exporters. In the *ICI* case, for example, the Court declined to take action with respect to two Latin American companies each jointly owned by an American and a foreign competitor, upon a showing that exports from and imports into the Latin American markets of the jointly-held companies were not feasible.[87] Thus, although the Court found that the purpose of the parents in forming a Chilean joint venture was unlawful, it held that the resulting restraint was insufficient to justify divestiture:

> "* * * exportation by the company to the United States is not feasible; the possibilities of presently encouraging exports from the United States in this field to this market are doubtful and remote save as to raw materials." [88]

Finally, the American investor may even acquire outright a foreign company, under proper circumstances. For example, he should be able to acquire an overseas company which is not engaged either in importing to or exporting from the United States, for in this case it is not clear that our antitrust laws would apply.[89] Again, he should

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[85] *U. S.* v. *United Fruit Co.*, CCH 1958 Trade Cases ¶ 68,941, § III (E. D. La. 1958); *U. S.* v. *American Smelting & Refining Co.*, CCH 1957 Trade Cases ¶ 68,836, § III (S. D. N. Y. 1957); *U. S.* v. *United Engineering and Foundry Co.*, CCH 1952-53 Trade Cases ¶ 67,378, § III (W. D. Pa. 1952).

[86] *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, 534 (S. D. N. Y. 1945).

[87] *U. S.* v. *Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S. D. N. Y. 1952).

[88] *U. S.* v. *Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 244 (S. D. N. Y. 1952).

[89] But cf. *Matter of Dresser Industries, Inc.*, FTC Dkt. No. 7095, CCH 1957-58 Trade Reg. Reporter Transfer Binder ¶ 27,122 (Mar. 26, 1958).

be permitted to acquire a company which is so engaged in the foreign commerce of the United States, if the effect of the transaction may not be to cause any substantial restraint of competition in the United States, for under these circumstances it is unlikely that our antitrust laws would be violated.[90] Even the stringent provisions of Section 7 of the Clayton Act limit their prohibitions to acquisitions:

> "* * * where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." [91]

Unreasonable Restraint

The American investor, furthermore, may even engage in direct and substantial restraints of United States trade and commerce, so long as those restraints are viewed to be reasonably ancillary to his investment.

For example, an American businessman may join with competitors in forming and operating a joint venture in a market readily accessible to the foreign trade of the United States. Such joint ventures are not forbidden in such markets.[92] On the contrary, they may:

> "* * * show a laudable effort to increase American trade with foreign countries." [93]

Where organized and operated in order to facilitate production and/or distribution in the foreign markets involved, without any accompanying restriction upon American imports and exports, such joint activities are viewed as lawful:

> "Such activities may encourage trade by affording means for sharing risks of sometimes hazardous foreign operations. They should thus be deemed beyond the reach of our antitrust laws if they involve no restrictions on American imports or exports of

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90 *U. S.* v. *Standard Oil Co. (N. J.)*, 47 F. 2d 288 (E. D. Mo. 1931).

91 § 7 of the Clayton Act, 38 Stat. 731 (1914), as amended; 15 U. S. C., § 18 (1958).

92 *U. S.* v. *Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S. D. N. Y. 1951).

93 *U. S.* v. *Keystone Watch Case Co.*, 218 Fed. 502 (E. D. Pa. 1915), appeal dismissed, 257 U. S. 664 (1921).

goods or capital and do not unreasonably restrain competition in American domestic markets." [94]

Indeed, under some circumstances, the parties may even enter into limited covenants not to compete with the newly organized joint venture, provided that:

> "The purpose of the agreement was the development and exploitation of a new business." [95]

Likewise, the acquisition of a foreign company substantially engaged in importing into or exporting from the United States may be viewed to be reasonable, if any resulting restraint is justified by the financial and competitive necessities of the overseas company.[96]

Unlawful Restraint

Any investment in the European Community which results in a direct, substantial and unreasonable restraint of United States trade, however—like any other transaction—is subject to attack under our antitrust laws.

Thus, a plant may not be constructed and used maliciously to harass[97] or foreclose[98] competition in the export or import trade of the United States.

Again, a subsidiary may not be misused. For example, a foreign subsidiary may not enter into cartel activities in violation of our antitrust laws with the knowledge and consent of its American parent,

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94 Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 90.

95 *U. S.* v. *E. I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. C. Del. 1953), aff'd, 351 U. S. 377 (1956).

96 H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 6 (1949); S. Rep. No. 1775, 81st Cong., 2nd Sess., p. 7 (1950); *International Shop Co.* v. *FTC*, 280 U. S. 291 (1930); *U. S.* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935); Letter of Victor B. Hansen, Ass't Att. Gen., dated May 29, 1958, CCH Trade Reg. Reporter, Vol. 1 ¶ 4207.105 (10th Ed.).

97 See dissenting opinion by Justice Stone, *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 629-30 (1927).

98 *U. S.* v. *Aluminum Company of America*, 148 F. 2d 416, 431 (2d Cir. 1945).

without implicating that American parent.[99] Likewise, a major foreign competitor may not sell a minority interest in its stock to an American company and thereafter utilize such sale to justify an otherwise unlawful agreement to divide markets with that American company. Under such circumstances:

> "The fact that there is common ownership or control of the contracting corporation does not liberate them from the impact of the antitrust laws. * * * "[100]

In the same manner, a joint venture may be a mere corporate device utilized only to eliminate present[101] and future[102] competition between the parties in foreign markets. When a direct and substantial restraint of U. S. commerce results therefrom and that restraint cannot be justified under the rule of reason, needless to say, such a joint venture here also would become unlawful.

> "It is settled that joint manufacturing ventures, even in domestic markets, are not made unlawful *per se* by the Sherman Act, but become unlawful only if their purpose or their effect is to restrain trade or to monopolize. * * * "[103]

Finally, acquisitions of stock or assets of a foreign company may be unlawful, where *e.g.*, the:

> " * * * acquisitions were part and parcel of * * * a territorial allocation."[104]

In other words, an investment—whether in a plant, in a subsidiary, in a joint venture or in another company—is neutral. It may be used lawfully or unlawfully. The application overseas of our antitrust laws

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99 *U. S.* v. *General Electric Company*, 82 F. Supp. 753 (D. C. N. J. 1949).

100 *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 598 (1951).

101 *U. S.* v. *Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S. D. N. Y. 1951).

102 *U. S.* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. C. Mass. 1950).

103 *U. S.* v. *Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S. D. N. Y. 1951).

104 *U. S.* v. *National Lead Co.*, 332 U. S. 219, 363 (1947).

questions such an investment only when it is shown to be part of some other arrangement which unreasonably, directly and substantially restrains the trade and commerce of the United States.

Visitor

Further Problems

The American engaged in business in the European Community, it has been seen, is a visitor on foreign soil who must conform not only to foreign but also to U. S. law. He has wide areas in which he may conform only to local regulations, but in certain phases of his business he must also serve a second, or antitrust, master.

His antitrust troubles, however, do not end here.

These legal problems of an overseas American are complicated, in part, by competitive considerations. The business community that he seeks to enter embraces suppliers, customers and competitors who may engage in competitive restraints forbidden to him. He may be forced to compete abroad, therefore, under a handicap of antitrust law not applicable to competitors in addition to the commercial handicaps of nationality, language and custom. This legal handicap may be particularly burdensome because of the uncertainty of the rules for compliance with our antitrust laws. The American businessman may enter into foreign contracts in good faith, subsequently find that under new case law these contracts have become unlawful, and thereupon be required either to repudiate or to purchase a release from contractual obligations which are viewed as lawful by the foreign contracting party.

These legal problems of an overseas businessman, however, are even more seriously complicated by political considerations. The government of the nation in which he is partaking hospitality often takes the position that he should bow down before no other sovereign, and may frankly warn him not to expect divine intervention to seal the mouths of its legal lions should he attempt so to serve another government. Accordingly his allegiance to U. S. antitrust laws —which may or may not accord with the views of the local government—can under some circumstances result in denial of government approval for day-to-day commercial transactions, forfeiture of underlying government franchises and/or even fines and imprisonment.

These political complications are not fanciful.[105] Increasingly governments of friendly nations have both officially and unofficially asserted that American businessmen are not welcome as visitors on their soil if they come:

> "* * * merely as projections of United States trade and commerce and thereby subject to United States policies in priority to the laws, customs and interests of the countries in which such * * * [enterprises] carry on business." [106]

The bewildered businessman, under these circumstances, finds no solace in being told to render unto the local Caesar that which is Caesar's and unto antitrust that which is antitrust's. Nor does he desire to make the choice suggested in a recent tax case involving the United States and Panama, to the effect that if the businessman:

> "* * * cannot, as it were, serve two masters, and comply with the lawful requirements both of the United States and of Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom." [107]

Official Courtesy

Fortunately, some steps are currently being taken by our Government to avoid forcing our overseas businessmen to elect either to defy our antitrust laws abroad or to withdraw within our territorial borders. These steps consist of Government procedures seeking to determine in advance of antitrust litigation whether some foreign government is interested in its legal issues and thereupon courteously obtaining the views of these governments concerning the issues and the relief of the proposed action.

Thus, our Department of Justice today is automatically checking with our Department of State before bringing any new actions under our antitrust laws which might be of possible concern to foreign governments:

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105 See *e.g.*, Brewster, *Antitrust and American Business Abroad* (1958), Chapter 3.

106 Fulton, *Address* in How to Comply with the Clayton Act, CCH Antitrust Law Symposium (1959) pp. 39, 46.

107 *First National City Bank* v. *Internal Revenue Service*, N. Y. L. J. Jan. 21, 1960 (2d Cir. 1959).

> "In all such instances, where appropriate, we [i.e., the Department of Justice] consult with the officials of other Government agencies such as the Departments of State," etc.[108]

Again, the Department of State on occasion then consults with other governments to determine their views both on the subject matter and on the proposed relief in the contemplated action. This latter procedure has not, however, been utilized with any regularity:

> "* * * the Department [of State]'s activity in particular cases has consisted mainly of advising with the Department of Justice as to the implications overseas of a particular action." [109]

It is now recognized, however, that our Department of State must take a more active role in thus contacting, in advance of international antitrust actions, the foreign governments affected by such litigation. For example, officials both of the United States and of Canada recently agreed upon the necessity for such pre-complaint exchange of views.[110] Once the foreign government has indicated an interest in a particular action, it should then be kept advised of the progress of the litigation so that demands for foreign files, jeopardy to foreign contracts and relief affecting foreign parties occur with the full knowledge even if without the complete consent of friendly allies. It is true that any such advance consultation on the issues, proceedings, and proposed relief of such an antitrust action may not always be successful:

> "But the fact that the foreign government in question had been consulted in advance would tend to lessen the violence of its reaction to enforcement of our law." [111]

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108 Hansen, *The Enforcement of the United States Antitrust Laws By the Department of Justice to Protect Freedom of United States Foreign Trade,* 11 A. B. A. Antitrust Section Report 75, 76 (1957).

109 Becker, *The Antitrust Laws and Relations with Foreign Nations, How to Comply with the Clayton Act,* CCH Antitrust Law Symposium (1959) pp. 51, 58.

110 See Fulton and Becker, *supra.*

111 Becker, *The Antitrust Laws and Relations with Foreign Nations, How to Comply with the Clayton Act,* CCH Antitrust Law Symposium (1959) pp. 51, 59.

Judicial Caution

Fortunately, also, other steps are being taken by our courts to safeguard Americans abroad from having to choose between local and antitrust commands, by taking care—as previously indicated—not to order action which is forbidden by foreign law.

For example, our courts have not required overseas businesses to produce files where such production would violate foreign laws. They have ruled that they have the power[112] to require such production.[113] They have nevertheless recognized their obligations to respect the limitations upon judicial power customarily observed by the courts of friendly nations[114] and have permitted defendants to offer proof of foreign laws proscribing production of subpoenaed files.[115] Thus while it is true that our courts affirm their rights to require Canadian subsidiaries of American parents to produce files in contravention of Canadian law, there is no record as yet of an American director of such a Canadian subsidiary being:

> "* * * stretched and shackled, as it were, over the international boundary, with Washington putting lighted splinters under his toenails and Ottawa tearing off his fingernails." [116]

Similarly, our courts have not ordered overseas businesses to engage in transactions in violation of the rules and regulations of foreign governments. On the contrary, they have either left enforcement of extraterritorial orders which might so conflict up to the discretion of foreign courts[117] or have modified their judgments to avoid conflicts

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112 *U. S.* v. *Schophony Corp.*, 333 U. S. 795 (1948); *U. S.* v. *Watchmakers of Switzerland Information Center, Inc.*, 134 F. Supp. 710 (S. D. N. Y. 1955).

113 *Matter of Grand Jury*, 72 F. Supp. 1013 (S. D. N. Y. 1947).

114 *U. S.* v. *Aluminum Company of America*, 148 F. 2d 416, 433 (2d Cir. 1945).

115 *In re Investigation of World Arrangements (Petroleum)*, 13 F. R. D. 280, 286 (D. C. D. C. 1952).

116 Fulton, *Address*, How to Comply with the Clayton Act, CCH Antitrust Law Symposium (1959) pp. 39, 49.

117 *U. S.* v. *Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S. D. N. Y. 1952).

with foreign laws,[118] or have had their provisions so modified by Departmental interpretation:[119]

> "The *ICI, Philips* and *Holophane* decrees are viewed by some as unexampled horrors of judicial impropriety. But in their denouncement, each was modified or interpreted to require no more than the foreign state would acquiesce in." [120]

The courts would grant more effective relief to international business organizations, however, were they to determine the status of foreign law before they order conduct possibly conflicting with that law. Thus a defendant should not be required to produce files abroad until the court has been informed of and has thereupon ruled concerning the legality under foreign laws of the production of those files. Again, a defendant ought not to be enjoined from engaging in overseas conduct until the court has received evidence as to whether that conduct is required by formal or informal governmental sanctions. In the event that proof is forthcoming that the proposed injunction would prohibit cartel-like conduct which is mandatory abroad:

> "There is no reason to believe that such proof would not avail, even though it fell short of explicit formal legal compulsion to cartelize." [121]

The courts, it might be added, should be scrupulous to avoid giving even an inference in dicta that our laws require our overseas businessmen to abuse the hospitality of their foreign hosts by ordering the former to flout the foreign laws of the latter.

Eventual Compromise

Most important of all, indications abound that a spirit of compromise may eventually resolve much of the political controversy heretofore complicating the legal problems of the overseas businessman.

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118 *U. S.* v. *General Electric Company*, 115 F. Supp. 835 (D. C. N. J. 1953).

119 See Letter of Solicitor General, dated Nov. 8, 1956, filed in connection with *U. S.* v. *Holophane Co.*, 352 U. S. 903 (1956).

120 Brewster, *Extraterritorial Effects of the U. S. Antitrust Laws*, 11 A. B. A. Antitrust Section Report 65, 72.

121 Brewster, *Antitrust and American Business Abroad* (1958), p. 93.

The private bar today rarely regards the *Banana*[122] case as current authority restricting the reach of our antitrust laws to conduct within our territorial borders. It has joined our Government in conceding the application of these laws to direct, substantial and unreasonable restraints of our trade and commerce where the principal acts effectuating these restraints take place abroad.[123]

The public bar, on its part, rarely seeks to utilize dissenting views from *Timken*[124] and dicta in *Minnesota Mining*,[125] to condemn the normal establishment and operation of subsidiaries and join ventures abroad. It has rather united with the private bar in deploring any such misuse of such isolated judicial language to prejudice the conduct of overseas business.[126] Unofficially, both public prosecutor and private practitioner agree that the courts should exercise greater care in the phrasing of their opinions to avoid casting unnecessary doubts upon such essential methods for doing business abroad.

Both our Government and those of foreign nations, finally, are moving closer toward the view that substantial and unreasonable restraints of trade and commerce from whatever source are injurious to all nations. Thus the bilateral treaties of friendship, commerce and navigation entered into between our country and friendly European nations have provided for joint consultation with respect to international restraints of trade.[127] Again, the antitrust provisions of the Rome Treaty[128] furnish striking evidence that all roads—whether

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122 *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909).

123 Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 65-77.

124 *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593 (1951).

125 *U. S.* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. C. Mass. 1950).

126 Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) pp. 88-91.

127 For example, the Treaty of Friendship, Commerce and Navigation with Italy, Feb. 2, 1948, Art. XVIII, 63 Stat. (2) 2255, T. I. A. S. No. 1965 (effective July 26, 1949); and the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, Art. XVIII, [1956] 2 U. S. T. & O. I. A. 1839, T. I. A. S. No. 3593. *Cf.* Treaty of Friendship, Commerce and Navigation with the Netherlands, March 27, 1956, Art. XVIII, [1957] 2 U. S. T. & O. I. A. 2043, T. I. A. S. No. 3942 (effective December 5, 1957).

128 See, e.g., Treaty Establishing the European Economic Community, Articles 85 and 86 (effective January 1, 1959).

in the European Community or in the United States—eventually may lead to the elimination of such restraints. It is earnestly hoped that in due course all nations of the Western World will cooperate to encourage the free flow of goods, intangibles and investments across international borders without engaging in jurisdictional disputes so injurious to the innocent abroad who wishes only to know the rules of the business game.

This ultimate common ground of a united front against antisocial restraints will only be reached, however, if we of this country will keep in mind—as the introduction to this paper suggests—that the United States is the child essentially of European parents. We should not unduly criticize our ancestral home for desiring to determine the house rules binding upon those who share its hospitality. Our parents will far more readily adopt our antitrust way of life if their child is seen conscientiously to practice, but is less frequently heard in preaching, its competitive virtues.

Conclusion

We have delegated to our courts under the antitrust laws an authority which they have under no other branch of the law.[129] The courts, in turn, in their application of these laws, have sought to understand the facts peculiar to the businesses before them[130] and to refrain from requiring a delusive freedom divorced from realities.[131] Their objective has been to insure effective[132] rather than some unattainable absolute[133] competition.[134]

This understanding judicial administration of our antitrust laws, in the opinion of the writer, alone has made it possible for the Ameri-

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129 *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. C. Mass. 1953), aff'd 347 U. S. 521 (1954).

130 *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

131 *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360 (1933).

132 *United States* v. *Aluminum Co. of Amer.*, 91 F. Supp. 333, 340 (S. D. N. Y. 1950).

133 *Fed. Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 92 (1953).

134 For further citations, see Van Cise, *Understanding The Antitrust Laws* (1958) Chapters I and II.

can businessman to live abroad with our antitrust laws. As previously mentioned above, this businessman must compete overseas handicapped by his foreign background, language and nationality. He would not long survive there were he required to conform unnecessarily to U. S. antitrust standards ignored in whole or in part by local competitors. Effective competition, under these circumstances, requires that the courts continue to recognize in future antitrust proceedings that he must have large freedom of action[135] in the absence of conclusive proof that his conduct directly, substantially and unreasonably restrains U. S. trade and commerce.

Our courts, however, as in the past, need the wholehearted cooperation of our executive departments in this understanding administration of our antitrust laws. Our Departments of Justice and State are strongly urged to perfect their current liaison procedures so that all new extensions of antitrust litigation to the files and conduct of our overseas companies are cleared in advance with foreign governments sharing jurisdiction over these companies. They are likewise earnestly petitioned to evaluate anew the wisdom of any antitrust demands upon American businessmen abroad which are not or cannot be made upon their foreign competitors. Above all they are respectfully requested to continue to exercise the greatest care in any attempt to push further our antitrust frontiers, lest—to borrow the language of the Supreme Court in a ruling on intrastate commerce—

> "* * * by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offenses into crimes under the statutes of the United States." [136]

[135] *Fed. Trade Comm'n* v. *Curtis Pub. Co.*, 260 U. S. 568, 582 (1923).

[136] *Nash* v. *United States*, 229 U. S. 373, 378 (1913).

IMPLICATIONS OF THE INDIVIDUALIST THEORY OF INVENTION

by

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In this note we comment critically on certain aspects of the interesting paper, "Size of Firm, Monopoly, and Economic Growth," presented by Professor D. Hamberg to the Joint Economic Committee.[1] Professor Hamberg has argued in effect, contrary to the conclusions of most economic historians and students of the patent system, that the individual inventor is just as important as he was in 1787. Hamberg takes the position that large industrial research laboratories are unnecessary, if not harmful, and that economic progress would be helped, not hurt, by their dissolution. He bases much of his attack on large-scale research on the assumption that the companies that carry on this activity are monopolies, or at least, oligopolies. It is his belief that research activities should be carried on by the government, universities, independent or trade-supported research laboratories, and by individuals.

At the outset we wish to make clear that we are sympathetic with Hamberg's distrust of monopoly power and also with his recommendation that government expenditures on research be expanded. However, we feel that in his analysis of the relation between invention and business size he has (1) set up a straw man as the object of his attack, (2) tended to confuse size with monopoly, (3) misunderstood the economics of research and (4) rested his argument for breaking up large-scale research on a fallacious conception of the process of invention.

ED. NOTE: This article is an expanded version of material appearing in the Joint Economic Committee's *Employment, Growth and Price Levels, Hearings* (1959).

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1 *Employment, Growth and Price Levels, Hearings,* Part 7, pp. 2337-2357 (1959) [hereinafter cited, *Hearings*].

1. The straw man in Hamberg's argument is an overstatement of the position he is attacking. Certainly no one argues seriously that "technical development is now the *exclusive* preserve of the . . . research laboratories of the giant concerns," nor are we aware of any economist who would give an affirmative answer to his rhetorical question, "Has large size per se been a guarantee of serious interest in research . . . ? "[2] But to prove that the world is not flat does not prove it to be round. Hamberg is on solid ground in contending that some important discoveries have been made outside the laboratories of giant corporations, that much research by large corporations is financed and stimulated by government (public) funds, and that not all large firms engage in research to the same degree. But it does not follow, as he seems to be saying, that the research carried on in such large laboratories as those of Bell, duPont and General Motors could be eliminated without sacrificing technological progress.[3]

2. It is not clear that size, in an absolute sense—which is how Hamberg uses the term—measures monopoly power. A small firm in a small industry may enjoy more market power than a large firm in a large industry. An integrated oil company may have less monopoly power than a drug manufacturer, though its size is much greater. Hamberg appears to think that any industry where there is not atomistic competition is monopolized. But atomistic competition is impossible in any industry whose technology requires large scale units—which includes a large proportion of American industry. Of course, if monopoly power exists, whether on the part of large or small business, it may very likely retard or misuse technical progress.

We do not defend monopoly power of any sort on the grounds that it promotes technological research and development. We assert rather that large scale research—however financed—is today fundamental to the process of which invention is a part, and that Hamberg's confusion of large size and monopoly really weakens his argument. The attack on monopoly power must rest on other grounds than large firms' supposed failure to contribute adequately to the economy's research and development requirements.

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2 *Hearings*, p. 2338 (our emphasis).

3 *Ibid.*, pp. 2343-2345.

3. Echoing Professor Machlup,[4] Hamberg argues that industrial development by large firms tends to draw personnel and research facilities away from more socially desirable employment in "basic" research and education. In the same context, applying a variation of marginal analysis, he justifies governmental support for basic research on the grounds that public agencies have "much lower time preference and risk discount rates" than do private firms.[5]

Rapid accumulation of scientific knowledge requires an extension of public support either directly to government laboratories such as the Bureau of Standards, or by contract to educational institutions. But we fear that if we were to rely on Hamberg's reasoning, there would shortly be no basic research at all, for by its nature it has—in advance—no calculable marginal worth. Hamberg's assumption that the government has a lower time discount and risk discount rate than private individuals is therefore, not persuasive. It would be much more to the point to emphasize the divergence between the marginal social product and the marginal private product of research. However, even though we know the divergence is large, we cannot measure it. Not only is it hard to estimate annual savings from technological change, but it is even more difficult to isolate the "cost" of the advance in scientific knowledge.

The "basic research" which made hybrid corn possible came from a quite separate line of inquiry—Shull's interest in genetics—which could not have been justified in advance at any non-negative rate of discount. The accumulation of scientific knowledge is not an economic but a cumulative social process, as we show in more detail below. All forms of research that add to useful knowledge, whether carried on in large corporate laboratories by teams, by university professors and their assistants, by public servants, or by solitary amateurs in garrets, should be encouraged, since from all indications we are far from equating the marginal social product of knowledge with its opportunity cost. Moreover, each type of research gains from the others. Determination of the proper total amount of expenditure is a policy question that, unlike reaching the most profitable amount of R & D for a single firm, economics is simply not equipped to resolve.

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4 128 *Science* 1320-25 (1958).

5 *Hearings*, pp. 2346-47.

Certainly, research facilities may be wasted or misdirected through frivolous, duplicative or socially undesirable programs. No doubt, much corporate research can be so classified. But the same generalization applies with at least equal force to small-scale independent or "individual" research. And it may also apply, as Professor Solo has shown, to much government-sponsored research.[6]

4. As Hamberg recognizes, his case against large-scale research is bottomed on a survey of the origins of "inventions," which are conceived to differ, somehow, from "research." No one doubts that invention, however defined, should be encouraged. But this conclusion must rest on grounds other than a nostalgia for the 18th and 19th century individual inventor's role in the cumulation of technical knowledge. This nostalgia leads Hamberg to a (qualified) defense of the patent system as a means of "maintaining competition," since it is "the one source of potential reward for the independent inventor." [7] The practice of granting temporary monopolies in the form of patents, in English and American law, was based on the assumption that public good—"the progress of science and the useful arts"—would flow from private individuals' search for gain in the form of patentable devices or improvements in productive techniques.[8] There may have been justification for such an argument in a period when manufacture was small-scale and individual enterprise was the prevalent form of business, when natural persons could reasonably be identified with new products, devices or methods. Whatever the historical reality, it is nothing but a pure fiction, hallowed by hagiographic tradition, to maintain that this view of the patent law realistically reflects the inventive process today.

If our view of the true nature of the process of invention is correct, recent judicial trends limiting the scope of the patent grant are to be commended. But a reversion to an 18th century theory of invention would strengthen the monopoly power Hamberg, and we, fear. This theory was used to justify pushing the patent grant to the point

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6 R. Solo, *Synthetic Rubber: A Case Study in Technological Development under Government Direction*, Senate Subcommittee on Patents, Trademarks and Copyrights, Study No. 18 (1959).

7 *Hearings*, p. 2352.

8 L. Vaughan, *The United States Patent System* (1956), Chapter 1, esp. pp. 27-33.

where it would permit, in the interest of stimulating and rewarding the "inventor," monopolistic control of vast industries. Only the growing realization by the courts of the inapplicability of the individualist theory of patents has protected the community against large-scale exploitation.[9]

Economists who have devoted particular attention to the economics of invention and technical progress have generally agreed that the individualist theory of the inventor fails to conform to the realities of the modern industrial society.[10] Duplicate or multiple inventions or discoveries are so numerous as to be typical, not exceptional.[11] The "idea" for an invention is almost impossible to trace to one individual; indeed, it is difficult to isolate the invention itself.[12] Invention is a cumulative process. With growing awareness of the uses of science, inventors in highly organized research laboratories march along what is almost a well-marked route.

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[9] The important decisions need only be listed here. In *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 3200 s 661 (1944), the patent privilege was held void when extended to unpatented elements. In *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 (1945), the Supreme Court refused to permit the patent privilege to be extended to cover an industry. In *U. S.* v. *Line Material,* 333 U. S. 287 (1948), the court held that "the merging of the benefits of price-fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of non-patentable goods." *Ibid.*, p. 305. *U. S.* v. *U. S. Gypsum* held to the same effect. 333 U. S. 364 (1948). Recognizing the changing nature of invention the courts have enforced higher standards of patentability. Even though the Patent Act of 1952 states that patentability "shall not be negatived by the manner in which the invention was made" (Sec. 103), it is unlikely that we shall see a substantial watering down of Thurman Arnold's rejection of a patent claim based on routine experimentation [*Potts* v. *Coe,* 140 F. 2d 470, 475 (1944)] or Justice Douglas' "flash of creative genius" [*Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 90–91 (1941)]. If Professor Hamberg's resuscitation of the individual inventor theory were successful, we would expect to find these judicial bulwarks against patent monopoly overturned.

[10] W. H. Hamilton, *Patents and Free Enterprise,* TNEC Monograph No. 31, 1941; A. E. Kahn, "The Fundamental Deficiencies of the American Patent Law," 30 *American Economic Review,* 475 (1940); F. L. Vaughan, *op. cit., passim;* G. W. Stocking and M. W. Watkins, *Monopoly and Free Enterprise* (1950), Chap. 14; T. Veblen, *The Instinct of Workmanship* (1914), *passim.*

[11] W. F. Ogburn, *Social Changes* (1922), pp. 99-102.

[12] E. G. Singer, Holmyard, Hall & Williams, *A History of Technology* (1958), Vol. IV, *passim.*

"I think we should discourage the perhaps popular conception that the most successful scientists follow a career of stumbling upon important discoveries. . . . The discovery at the Bell Telephone Laboratories of the semiconductor phenomena which made possible the transistor was in my view not an accident." [13]

Yet this is the research that Hamberg calls "hit or miss!" [14] If we want to build a space ship, find a cure for poliomyelitis or produce an efficient solar energy machine, we allocate sufficient funds and the job is done—the time required depending largely on the funds made available.[15] This does not mean that individual, chance invention no longer exists. But it plays a subsidiary role.

Impatience with industrial bureaucracy and the plight of the organization man should not lead us to deny the economies of scale. The eclipse of the individual inventor has paralleled the rise of large-scale enterprise in much of industrial life. Competitive industries with small firms spend very little on research.[16]

In dismissing what may almost be called the "accepted" view of the nature of invention and technological progress (which he mistakenly identifies with a belief that invention springs *only* from large corporate laboratories), Hamberg relies mainly on *The Sources of Invention* by Jewkes, Sawers and Stillerman. This book confirms his belief that we should assign primary credit for specific processes or developments to "the basic research . . . performed by individual inventors working along . . ." [17] Professor Jewkes there concludes that "the large research organizations of industrial corporations have not been responsible in the past fifty years for the greater part of

[13] Dr. G. G. Suits, "Opportunity for Basic Research in Industry," National Science Foundation, *Research and Development and Its Impact on the Economy* (1958), p. 93.

[14] *Hearings*, p. 2343.

[15] This assumes efficient—probably centralized—applied research for break-through. U. S. competitive research in missiles so far seems to have proved less efficient than the state monopoly of research in Russia. See F. Gabney, "The Missile Mess," *Harpers*, January 1960.

[16] I. M. Stelzer, "Technological Progress and Market Structure," 23 *Southern Economic Journal* 63 (1956).

[17] *Hearings*, p. 2340.

the significant inventions." [18] For Jewkes, Watt and the steam engine and Cartwright and the power loom seem to be the archetypes of inventors and inventions.[19] Since Jewkes nowhere attempts to list all the inventions he regards as significant and relies on a test of significance that equates the ball-point pen with penicillin, his statement must remain merely an article of faith, well-argued, but not statistically substantiated. But there are more serious objections to his attempt to revive the individualist theory of invention, "we have no evidence nor even assertion that the instant inventions were not selected to prove that thesis (that corporate laboratories have been overrated)." Moreover, "the case histories and the whole book exclude . . . vast classes of modern invention, viz., the military ones (which . . . constantly interchange with civil technology), and also agricultural, medical and other governmental inventions." [20]

Jewkes dismisses as unimportant the problems that have troubled other students of the history of invention, such as the often insuperable obstacles to isolating the inventor. Who invented the steamboat? The incandescent lamp? The atomic bomb?[21] The ambiguities of the Jewkes-Hamberg approach become evident whenever one examines a list of inventions. Hamberg draws on Jewkes' list to illustrate "individual" inventions, one of which, he says, was streptomycin.[22] Four pages later he lists streptomycin as an example of a "chance" discovery of a team. Preceded by the discovery of penicillin, produced at Rutgers University by a team of researchers headed by Dr. Waksman, and financed by Merck & Co., streptomycin proves elusive only if one insists, like Hamberg and Jewkes on the necessity for analytical purposes of isolating inventions and inventors and drawing a line between individuals and large-scale research.[23] Similar difficulties of course are presented by other inventions that Hamberg

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[18] *The Sources of Invention* (1958), p. 185.

[19] *Ibid.*, p. 17.

[20] S. C. Gilfillan, review of "The Sources of Invention", 4 *The Engineering Economist* 44 (1958).

[21] See S. C. Gilfillan, "Who Invented It?" 25 *The Scientific Monthly* 529 (1927).

[22] *Hearings*, p. 2339.

[23] *Hearings*, pp. 2343-2344.

—following Jewkes—classifies as "individual." Houdry's invention of catalytic cracking became a commercial reality only after Sun's expenditure of $11 million.[24]

It seems obvious that, even if one uses Jewkes' definition of an invention "confidence that something should work, and the first rough tests that it will, in fact, work," [25] the resources of large corporations must inevitably be drawn upon as they were for the "rough tests" of inventions like catalytic cracking,[26] or the successful development of the cotton picker, the ideas for which were attributable to individuals (as, indeed, all ideas must be).

Hamberg's second support for his confidence in the individual inventor is Professor Schmookler's study of patents.[27] Schmookler's study of 100 patents and 130 patentees (selected at random) from patents issued in October and November, 1953 showed that 41.0 per cent of his sample of inventions were made by individuals rather than employees of firms or the U. S. government.[28] Examination of data by states showing technologists per 10,000 workers and patents issued per 10,000 workers for 1949-1951 as compared with 1899-1901 convinced Schmookler that whereas most inventions around the turn of the century were made by individual inventors, "inventive activity by state has become increasingly linked to factors associated with the presence of technologists." [29]

There is, of course, nothing in this conclusion that is contrary to expectations. Schmookler thoroughout assumes that patents are the same thing as inventions. An invention is taken to mean something that increases output per unit of input. If there were any significant correlation between patents and inventions, the rate of potential economic growth would have shown a frightening secular decline in

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24 M. De Chazeau and A. E. Kahn, *Integration and Competition in the Petroleum Industry* (1959), p. 297.

25 *The Sources of Invention*, p. 17.

26 It should be recalled that Eugene Houdry was independently wealthy, hired chemical assistants, and was to some extent anticipated by a 1916 installation of Gulf Oil Company.

27 "Inventors Past and Present," 39 *Review of Economics and Statistics* 321 (1957).

28 *Ibid.*, p. 323, Table 1.

29 *Ibid.*, p. 328.

recent years, as the number of patents issued has steadily dropped as a proportion of GNP. Patent statistics reflect at best the fact that some advances in a few industries, notably the chemical and electrical, lend themselves readily to the administrative requirements for submission to the Patent Office. They are, therefore, regardless of what statistical features may be applied to them, particularly unreliable in showing what role the individual inventor has played in technical progress.

In the past thirty, and perhaps the past eight years the ratio of patent grants to reliable indices of invention such as expenditures on scientific research and the number of engineers employed has sharply and almost uninterruptedly declined. In 1900, there were 42,000 scientists and engineers; 24,660 patents were granted. In 1954, there were 691,000 scientists and engineers; 33,872 patents were granted.

Unless one is prepared to argue that there has been a catastrophic drop in the "inventiveness" of corporate-hired scientists and engineers compared with that of "individual inventors," the proportion of patents granted to individuals has little relevancy to any discussion of invention.[30]

Attempts to divide the origin of inventions between individuals and corporate laboratories must inevitably founder on conceptual difficulties.

It seems more helpful to accept the fact that, to the extent that our economy has become one of large-scale enterprise, the technological investment in progress has grown correspondingly, in terms of equipment, assistance, expenditures on pilot plant and so on. And, in the light of the history of invention it would seem equally realistic to assume that wherever there is activity resulting in either scientific advance, or development, we have invention, even though it may not be patentable. A good measure of inventive activity is, therefore, expenditure on research. In 1958, the Federal Government was directly responsible for 43 per cent of the nation's research and development

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[30] J. B. Dirlam, "Patents and Progress," *Dun's Review*, April, 1957, pp. 53-54; S. Melman, *The Impact of the Patent System on Research*, Senate Subcommittee on Patents, Trademarks and Copyrights, Study No. 11 (1958), pp. 27-32; S. C. Gilfillan, unpublished studies on scientific publications, professional association membership, etc.

expenditure.[31] The National Science Foundation study cited by Hamberg actually shows that 2,950 companies accounted for more than one-half of the privately financed research and development in 1953, and that 200 companies were responsible for more than two-thirds of the research and development activity (including that financed by the Federal Government).

Hamberg attempts to escape from the uncomfortable implications of government financed research by arguing that there is something artificial about it, and that if we will somehow ignore the $4.4 billion the government spent in 1958 we will have a clearer idea of the sources of invention. But research on atomic energy, space travel and weapons systems seems (perhaps unfortunately) to be an integral part of current society. *If* we had the economy of 1860, the individual inventor would play a large role; but we must accept the passage of time and the consequences thereof. Again, this conclusion does not mean that all government research funds should go to General Electric, Boeing Aircraft, Raytheon and Sperry-Rand, especially since research contracts lead to production contracts under the present weapons system concept. Small laboratories and firms should be given every opportunity to obtain the funds they can use efficiently.[32]

Conclusion

Hamberg has been led astray, it seems to us, by failing to recognize that his real concern should be not with the location of the "invention" but rather with "basic" research—the pure science of today that, as Professor Urey said, becomes the applied science of a decade hence. Inputs necessary to produce activity of this kind may be close to zero; while the spark of genius of a mathematical logician might claim as returns a share in all output involving the use of digital computers. Individual inventors (in the Hamberg-Jewkes sense) or small firms, subject to strong economic pressures, are even less likely than the large-scale corporate laboratories to devote themselves to research of this kind.

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31 *Statistical Abstract*, 1959, p. 538.

32 See D. Novick and J. Y. Springer, "Economics of Defense Procurement," *Law and Contemporary Problems, Small Business*, Winter, 1959, p. 118.

ANTITRUST NEWSLETTER

Other Courts

Skaggs Drug Center Inc. v. *Union Carbide & Carbon Corp.* (Sup. Ct. Mont., dated Feb. 10, 1961).

Reaching the conclusion that the Montana Fair Trade Act is price-fixing legislation, prohibited by Art. XV, Sec. 20 of the State Constitution, the Supreme Court of that state has held the law to be unconstitutional.

F. T. C., et al. v. *Nash-Finch Co.* (C. A. 9th Cir., decided Feb. 15, 1961).

It was proper to use declaratory judgment procedures to obtain a review of the Federal Trade Commission's ruling that the 1959 amendment to the Clayton Act provisions dealing with enforcement and finality of FTC orders involving violations of that Act were retroactive.

Mid-South Distributors, et al. v. *F. T. C.* (C. A. 5th Cir., dated Feb. 23, 1961).

The Federal Trade Commission properly ordered automobile parts cooperatives and their member-jobbers to discontinue inducing suppliers to grant discriminatory discounts based on total volume placed under each co-op's name.

As before the FTC, the key issue was knowledge, on the parts of the co-ops and their members, that the discounts could not be justified by sellers on the basis of costs or meeting competition. The Court agreed with the Commission: knowledge that orders were processed and packaged in the same manner as though received directly from the member-jobbers, that there were no credit savings, and that the co-ops had been formed specifically to obtain maximum volume discounts under existing practices was sufficient.

The discounts were tested for their effect on competition only by reference to prices paid by jobbers who were not members of co-ops, and not by reference to prices paid by chain stores, integrated oil company and tire company outlets, or automobile dealers. As to these, the court said that any adverse effect is for Congress to change: "one caught in the middle cannot, to ward off his huge and overpowering rival, injure, even unwittingly, a smaller one."

P. W. Husserl, Inc., et al. v. *Simplicity Pattern Co., Inc.* (U. S. D. C. S. D. N. Y., filed Feb. 8, 1961).

Punitive refusal to deal with customers filing suits charging the seller with price discriminations is not justified under the *Colgate* doctrine, and is contrary to Congressional intent in making private suits a part of the antitrust enforcement program. Here, successive terminations of contracts with the plaintiffs joined in the suits convinced the court that the terminations were intended to discourage maintenance of these suits and filing of others, so that preliminary injunctive relief was proper.

Simpson v. *Union Oil Co. of California* (U. S. D. C. N. D. Calif., dated Dec. 30, 1960).

Since a lessee has no right to a lease renewal not provided for in the lease, a gasoline station operator whose one-year lease was refused renewal could not claim damages based on loss of income for a period of 15 years. Also, the record indicated he had derived comparable profits from the operation of a different company's station after termination of the lease.

Taxin & Taxin v. *Food Fair Stores, Inc., et al.* (C. A. 3rd Cir., filed Feb. 20, 1961).

Alleged false statements by a co-conspirator, described as intended to induce the plaintiff to give a release, did not invalidate the release as to a defendant not charged with participation in or knowledge of the statements. Description of the statements as part of a "continuing conspiracy" was rejected in the absence of explanation, since the release had no effect as to acts after its date.

Wilson & Co., Inc. v. *Ezra Taft Benson* (C. A. 7th Cir., dated Feb. 15, 1961).

The Secretary of Agriculture had authority to enter an order prohibiting price discrimination by a packer whether or not there was proof that the discriminatory practices complained of resulted in "competitive injury," "lessening of competition," or a "tendency to monopoly." The Act imposes no such requirement. Nor is his authority impaired by the fact that the acts complained of may also violate Sec. 2(a) of the Clayton Act; the Packers and Stockyards Act was intended to confer broader authority than that conferred on the Federal Trade Commission in its field. Although the court expressed the opinion that it would have preferred a more restricted order, it refused to reject or modify an order prohibiting discriminatory practices on a nationwide basis although the practices in issue had occurred in only one city area (San Francisco).

Johnson & Johnson v. *Janel Sales Corp.* (U. S. D. C. S. D. N. Y., filed Feb. 16, 1961).

The McGuire Act amendment invalidates contracts between wholesalers, retailers, etc., whether or not they are in competition with each other, and even though this permits indirect price fixing effective as to competing producers. However, there was insufficient showing to determine whether sales by a manufacturer to a "consumer" corporation had the effect of making the manufacturer a "retailer" so as to invalidate the fair trade contract it executed with a retailer and was here seeking to enforce; accordingly, a temporary injunction was granted, but without prejudice to the presentation of such facts.

J. Rosenfeld Co. v. *Lion Mfg. Corp., et al.* (U. S. D. C. N. D. Ill., E. Div., dated Jan. 25, 1961).

Plaintiff failed to prove unlawful price discriminations in sales of amusement machines.

Freedman v. *Philadelphia Terminals Auction Co.* (U. S. D. C. E. D. Pa., filed May 3, 1961).

A jury having answered "no" as to whether there had been proof of damage from allegedly unlawful terminal charges, it was unnecessary to consider whether a directed verdict was appropriate; even if there is proof of a violation in making brokerage payments,

it is not necessarily equal to the amount of damage, which must be proved.

Brown v. *Western Massachusetts Theatres, Inc.* (C. A. 1st Cir., dated April 24, 1961).

Denying a petition for rehearing, the court stated that in order to show conscious parallelism, there must be more than mutual awareness of similar conduct.

Dale Hilton, Inc. v. *Triangle Publications, Inc., et al.* (U. S. D. C. S. D. N. Y., dated May 2, 1961).

Allegations that a department store had refused further dealings with a supplier of the plaintiff, and that a magazine had thereafter refused to accept the supplier's advertising, carried no inference of conspiracy to exclude the plaintiff's mail order advertising, both actions being described in uncontroverted testimony as independent and justified by inadequate quality.

Banana Distributors, Inc. v. *United Fruit Co., et al.* (U. S. D. C. S. D. N. Y., dated May 5, 1961).

An individual defendant, who would be an indivisible joint tort feasor with the corporation of which he was an officer, was properly held to be covered by the same limitation period as the corporation, under the "single judgment" rule.

Periodical Distributors, Inc. v. *The American News Co., Inc., et al.* (U. S. D. C. S. D. N. Y., dated May 2, 1961).

Mere allegations of a conspiracy or participation in a conspiracy do not support venue; the decisions where this appeared to be the case actually involved situations in which the acts of conspiracy also constituted transaction of business for venue purposes.

Columbia Pictures Corp., et al. v. *Charles Rubenstein, Inc., et al.* (C. A. 8th Cir., dated April 27, 1961).

The fact that the shareholders of a theatre corporation claiming damages for conspiracy to deprive it of equal-run privileges had, in their capacities as shareholders of another theatre corporation, negotiated a lease to one of the defendants without either demanding equal-run privileges for the complaining corporation or expressing their dissatisfaction with the defendants' practices in that respect, did

not estop the complaining corporation, whose operating president had made a demand and did not participate in the lease negotiations.

Lipp v. *National Screen Service Corp., et al.* (C. A. 3rd Cir., filed May 2, 1961).

A stipulation that a group of related cases would be disposed of in accordance with the conclusions in a specified case justified summary judgment.

Bruner & Rich Plan of Springfield, Missouri, Inc. v. *Republic Acceptance Corp., et al.* (U. S. D. C. E. D. Ark., dated Feb. 14, 1961).

A finance company discounting notes for dealers of a related company, but using the mails to receive notes and distribute the proceeds, was not transacting business in the district where the dealers were located. Nor did two visits there by an officer, one to negotiate a dealership contract and the other to negotiate settlement of a dispute concerning proceeds of a check, change that status.

Department of Justice Activity

U. S. v. *Wilson & Geo. Meyer & Co., et ano.* (U. S. D. C. N. D. Calif., Consent Judgment, May 5, 1961).

Attorney General Robert F. Kennedy announced entry of a consent judgment terminating an antitrust case against two San Francisco firms charged with attempting to restrain trade in Canadian peat moss in violation of the Sherman Act.

The judgment includes injunctions forbidding restrictive activities by the defendant firms, Wilson and George Meyer & Co. and Sunshine Garden Products, Mr. Kennedy said.

The consent judgment was entered in United States District Court in San Francisco. The Department of Justice brought the action in

The complaint charged the firms had conspired with Canadian Peat Moss, Ltd., in an attempt to monopolize trade in peat moss imported from the province of British Columbia.

Use of peat moss for soil improvement has grown steadily. Imports in recent years have exceeded $11,200,000 per year.

Included in the activities barred by injunctions in the consent judgment are:

1. Allocating sales outlets and territories in twelve Western states;

2. Fixing prices for other retailers;

3. Setting quotas for retailers as the basis for discriminatory discounts;

4. Acting as a distributor for Canadian Peat Moss, Ltd., or for any other common sales agency of peat moss producers;

5. Selling peat moss from several Canadian producers under the trade-mark "Sunshine Brand."

U. S. v. *Oliver Electrical Mfg. Co., et al.* (U. S. D. C. E. D. Wis., Indict., June 6, 1961).

Six manufacturers of transmission line hardware were indicted by a federal grand jury in Milwaukee, Wisconsin, for price-fixing and other violations of section 1 of the Sherman Antitrust Act.

Attorney General Robert F. Kennedy said the defendants named in the single-count indictment are:

Oliver Electrical Manufacturing Company, Battle Creek, Mich.;
Utilities Service Company, Allentown, Pa.;
Hubbard and Company, Chicago, Ill.;
McGraw-Edison Company, Elgin, Ill.;
Joslyn Manufacturing and Supply Co., Chicago, Ill.;
A. B. Chance Company, Centralia, Missouri.

The last four companies named also were defendants in the heavy electrical equipment conspiracy cases in Philadelphia, but Mr. Kennedy said this case is unrelated and involves different types of products.

All six firms manufacture various kinds of equipment called "pole line hardware" for use "in the construction and maintenance of electrical transmission, distribution, and communication lines," the indictment said.

Listed in the indictment were such products as bolts, braces, cable extension arms, nuts, pins, rods, ridge irons, shims, straps, struts, thimbles and dead end tongues.

Mr. Kennedy said that according to the indictment the six defendant firms do more than 75 percent of all pole line hardware business in Wyoming, Montana, Colorado, New Mexico, Texas and all states east of those states.

Customers in those states, the indictment said, are principally electric utility companies and communications firms. They purchase equipment valued "in excess of $30,000,000 annually."

The indictment charged that "for many years past" the defendants have conspired to fix non-competitive prices and uniform discounts and to establish non-competitive distribution practices.

The result has been, the indictment said, that:

—Prices "have been raised, fixed, and maintained at artificially high levels";

—Price competition has been "restrained, suppressed and eliminated";

—"Distributors and public utility companies . . . have been denied the right to receive competitive bids."

Maximum penalty for each defendant is a $50,000 fine.

U. S. v. *Standard Oil Co. of Kentucky* (U. S. D. C. Ky., Consent Judgment, June 5, 1961).

Antitrust charges against the Standard Oil Company of Kentucky were terminated by entry of a consent judgment permitting the firm to merge with the Standard Oil Company of California.

Attorney General Robert F. Kennedy said that Standard of California, although not a defendant in the case, also agreed to be bound by the judgment, which was entered in United States District Court in Louisville, Ky.

The consent judgment requires that the firms:

—Terminate, as quickly as possible, a 1956 contract between Standard of Kentucky (Kyso) and the Standard Oil Company

of New Jersey (Jersey) requiring Kyso to buy 80 percent of its petroleum requirements from Jersey;

—Obtain no petroleum products from Jersey for sale in eleven Southern states after July 1, 1966;

—Agree not to participate in any agreement allocating sales territories.

The Government named Standard of New Jersey as a co-defendant in its complaint against Kyso, filed December 2, 1958. Mr. Kennedy said the charges against Jersey remain pending.

The complaint charged the 80 percent sales contract violated section 1 of the Sherman Act and section 3 of the Clayton Act. It also charged the firms conspired, in violation of the same section of the Sherman Act, to allocate sales in Mississippi, Georgia, Alabama, Florida and Kentucky to Kyso and sales in the rest of the country to Jersey.

Kyso is a marketing firm and has no production facilities and the merger with Standard of California provides Kyso with a new source of petroleum products.

It is expected that as a result of the merger Jersey will set up its own marketing system to compete with Kyso in Mississippi, Georgia, Alabama, Florida and Kentucky, Mr. Kennedy said.

At present, the three Standard firms are separate and unrelated corporations. Standard of Kentucky was one of 33 firms split off from Standard of New Jersey in 1911. Standard of California was founded in 1926.

The California firm, with principal offices in San Francisco, is the twelfth largest corporation in the nation. In 1959, it had gross operating income of $1,564,827,127. Standard of Kentucky had 1959 sales of $305,276,825.

"Despite the size of Standard of California," Mr. Kennedy said, "we have agreed to this judgment and have not opposed the merger because we believe it will stimulate competition. Where we have had one giant, in effect selling through Standard of Kentucky, now we will have two—competing against each other."

"In addition, because of provisions in the consent judgment, the competitive positions of independent refiners also should be improved."

These provisions require Standard of California and Kyso to obtain "at least forty percent of their requirements for automotive gasoline, kerosene, heating oil and diesel fuel from independent refiners" and obtain no more than fifteen percent from any single independent until July 1, 1976.

The 1958 complaint against Kyso and Jersey charged that from 1911 to 1948, Kyso bought approximately 98 percent of its petroleum products from Jersey. Since 1948, the total has exceeded 76 percent.

In 1957, the last full year before the complaint, Jersey sales to Kyso totaled 718,000,000 gallons of automotive gasoline and 1,654,000,000 gallons of other refined petroleum products, the complaint said.

Entered with the consent judgment today was a stipulation providing that the judgment be withdrawn if Kyso and Standard of California do not carry out their merger before December 31.

U. S. v. *Allen-Bradley Co., et al.* (U. S. D. C. W. D. Ohio, Consent Judgment, June 6, 1961).

Four manufacturers of composition electrical resistors, who were fined $101,000 in a criminal price-fixing action in United States District Court in Dayton, Ohio, returned to court this afternoon to sign a consent judgment terminating a companion civil antitrust suit.

Attorney General Robert F. Kennedy said the consenting firms are the Allen-Bradley Company of Milwaukee, Wisconsin; the Stackpole Carbon Company and the Speer Carbon Company, both of St. Marys, Pennsylvania; and the International Resistance Company of Philadelphia.

The four companies are the nation's only manufacturers of composition resistors. In 1959, they did more than $43,000,000 in business, Mr. Kennedy said.

These resistors are cigarette filter-sized devices used in electrical circuitry in radio, television sets and other electronic equipment.

The decree forbids the consenting firms to:

—Combine to eliminate or suppress competition;

—Fix prices or conditions together with other manufacturers or distributors;

—Submit rigged or collusive bids;

—Exchange information regarding future bids with competitors.

The decree also requires the three companies to submit affidavits, certifying they have not exchanged information with competitors, on the request of customer Government agencies, Mr. Kennedy said.

Civil action against the firms was brought last January 19. The Department of Justice charged they had, since 1955, fixed prices in violation of section 1 of the Sherman Act.

The companies, and two executives, also were indicted at the same time for identical offenses under criminal provisions of the Sherman Act.

The two executives indicted were Edward W. Butler, vice-president of marketing for Speer Carbon, and George W. Vater, sales manager of the Electronics components division of Allen-Bradley.

They and the four companies, having all pleaded nolo contendere, were fined this morning by United States District Judge Carl A. Weinman.

The separate fines: Allen-Bradley, $35,000; Spear, $25,000; Stackpole, $20,000; International Resistance, $15,000; Butler, $4,000; and Vater, $2,000.

U. S. v. *General Motors Corp.* (U. S. D. C. S. D. N. Y., Indict., April 12, 1961).

General Motors Corporation was indicted by a federal grand jury in New York on charges of using its vast economic power illegally to monopolize the manufacture and sale of railroad locomotives.

Attorney General Robert F. Kennedy announced the return of the indictment, which charged that General Motors violated section 2 of the Sherman Antitrust Act. Two substantial competitors were driven from the market and General Motors captured 84.1% of the locomotive business, the indictment said.

As a result, the indictment asserts that "the purchasers of locomotives and the public in general have been deprived of the benefits of competition," Mr. Kennedy said.

The indictment listed at least 14 ways in which General Motors assertedly misused its economic power to force most of the nation's

40 railroads to buy locomotives made by General Motors' Electro-Motive Division.

The indictment pointed out that General Motors is the largest manufacturing corporation in the United States in terms of total sales and assets and is probably the nation's largest shipper of freight. As a result, the complaint asserted, General Motors was able to vary its price and rate of return in locomotive sales, make investments in manufacturing facilities for railroad locomotives, and establish production capacity in a manner which no competitor could meet.

This power, the indictment asserted, was "unlawfully acquired and maintained." Among the ways in which General Motors did so, the indictment said, included:

> Routing rail shipments to favor purchasers of General Motors locomotives and withholding or reducing shipments from lines which purchased locomotives from General Motors' competitors.
>
> Building plants, warehouses and storage areas near lines of railroads for the purpose of persuading the railroads to purchase General Motors locomotives.
>
> Obtaining steel from General Motors suppliers on terms which were substantially more advantageous than those available to its competitors.
>
> Financing the sale or lease of locomotives on terms its competitors could not match.
>
> Participating in the formulation of locomotive specifications for use in obtaining competitor bids which prevented other manufacturers from competing.
>
> Selling locomotives at a loss in segments of the market where it had competition.

The indictment contained specific instances of such methods by General Motors, Mr. Kennedy said. One incident occurred November 24, 1958, when a General Motors official assertedly "informed" the Gulf, Mobile and Ohio Railroad that certain General Motors traffic would not be routed over its lines because other railroads had purchased more General Motors locomotives than Gulf.

The indictment asserted that General Motors increased its share of the locomotive business from 47.1% in 1946 to 84.1% last year, Mr. Kennedy said.

During the same period, the share of its principal competitor, Alco Products, Inc., dropped from 39.7 to 13.1%. Two locomotive builders, Fairbanks, Morse & Company and Baldwin-Lima-Hamilton Company, both have dropped out of the field, the indictment said.

From 1946 through 1959 General Motors received an average profit before taxes of 20.2% on locomotive sales in the United States while in the same period Alco Products averaged a 1.9% return before taxes on its sales.

Fairbanks, Morse has not sold a locomotive since 1958, the indictment said, and Baldwin-Lima-Hamilton has not sold one since 1956.

A fifth firm, General Electric Company, is also in the locomotive business, but it has produced only electric locomotives. It announced in April 1960 that it would enter the diesel field but has not yet sold a diesel locomotive.

The indictment said General Motors is possibly the largest freight shipper in the country with shipments of 11,711,925 tons and charges of $211,165,669 for the first nine months of 1959.

General Motors is the largest manufacturing company in the country with net sales in 1960 of more than 12 billion dollars.

Electro-Motive, one of 29 GM divisions, was created in 1930 out of two firms acquired by General Motors, the Electro-Matic Company, an early developer of diesel electric locomotives, and the Winton Engine Corporation.

From 1946 to 1959, General Motors manufactured approximately 17,343 locomotives with sales value of $2,681,545,429, the indictment said.

The maximum penalty for this alleged violation of the Sherman Antitrust Act is a $50,000 fine. Besides this penalty, a final judgment of conviction would be prima facie evidence against a defendant in any suit for damages by injured parties. It also would establish liability in any civil suit brought by the United States to secure relief against the asserted monopolization.

U. S. v. *The General Electric Co., et al.* (U. S. D. C. E. D. Pa., Complaints, April 11, 1961).

The Department of Justice filed six more civil complaints in Philadelphia for damages in the recent electrical price fixing cases.

Eleven corporations were named as defendants in one or more of the suits. Seven corporations were named as co-conspirators but not defendants.

In three of the cases the United States was the plaintiff. In the other three cases, the United States and the Tennessee Valley Authority filed suit jointly.

Attorney General Robert F. Kennedy said that the damages sought would run into millions of dollars. However, the complaints did not include any theories of damages nor claims for specific damages because the Department of Justice has not completed analyzing data of government purchases involved, Mr. Kennedy said.

The Department of Justice and the Tennessee Valley Authority filed a civil complaint on March 14 seeking to recover more than $12,000,000 in damages from five manufacturers of large outdoor oil and air circuit breakers. More damage complaints, besides the six filed today, may be filed in the electrical equipment case, Mr. Kennedy said.

The General Electric Company and the Westinghouse Electric Corporation were named as defendants in all six complaints filed today.

The Allis-Chalmers Manufacturing Co., of West Allis, Wisc., was named as a defendant in four suits and a co-conspirator in another. The I-T-E Circuit Breaker Co., of Philadelphia, was a defendant in three. The Federal Pacific Electric Company of Newark, New Jersey, the McGraw-Edison Company, Elgin, Illinois, and Wagner Electric Corporation and the Moloney Electric Company of St. Louis were named as defendants in two suits and co-conspirators in one.

The Cutter-Hammer Company of Milwaukee, the Square-D Company of Detroit and the Kuhlman Electric Company of Troy, Michigan were named as defendants in one suit.

The seven firms named as co-conspirators but not defendants were: the Norbute Corporation, General Switch Company Division of New York City; the Murray Manufacturing Corporation of New York City; Wadsworth Electric Manufacturing Company, Covington, Kentucky; Zinsco Electric Products Company, Los Angeles; Carrier Corporation, Syracuse, New York; DeLaval Steam Turbine Company,

Trenton, New Jersey; Worthington Corporation of Harrison, New Jersey.

Each of the complaints asserted that the conspiracies, in which the companies participated to fix prices and rig bids, began at least as early as 1956, and caused electrical equipment to be sold to the Tennessee Valley Authority or Government agencies at "high and artificial" prices.

The Government agencies involved included the Air Force, Navy, Army Corps of Engineers, Veterans Administration, the Departments of Commerce, Defense, Agriculture and Interior, the Atomic Energy Commission, the General Services Administration, the U. S. Government Printing Office and the National Advisory Committee for Aeronautics.

The three complaints in which the TVA is a plaintiff with the United States contained five counts each.

In Counts I, the TVA is seeking treble damages under Section 4 of the Clayton Act.

Under Counts II, the United States asks double damages plus forfeitures on purchases by the Federal agencies, including the TVA, under the False Claims Act.

Counts III are alternative to Counts II and seek single damages under Section 4A of the Clayton Act.

Counts IV are alternative to Counts I and seek double damages plus forfeitures under the False Claims Act in connection with the TVA purchases.

Counts V are further alternatives to Counts I in which the TVA seeks single damages under Section 4A of the Clayton Act.

The other three complaints contained two counts each.

Under Counts I, the United States is seeking double damages plus forfeitures under the False Claims Act.

Counts II are alternatives to Counts I and seek single damages under Section 4A of the Clayton Act.

The TVA did not participate in these three complaints because it had not made any purchases of two of the types of equipment involved and only a small number of the third product.

A brief outline of the six complaints follows: (In the first three, the TVA is a plaintiff.)

Power Switch Gear Assemblies

Defendants—Westinghouse, Allis-Chalmers, Federal Pacific, General Electric and I-T-E Circuit Breaker.

On June 22, 1960, the five firms and twelve individuals were indicted on charges of engaging in a conspiracy to fix prices, allocate business and submit collusive bids to Governmental agencies in violation of Section 1 of the Sherman Act. The five firms pleaded guilty to the indictment.

McGraw-Edison, Moloney Electric and Wagner Electric were named in the civil complaint as co-conspirators. The complaint asserted that the defendant companies, through their representatives, used the "phase of the moon" or "light of the moon" formula in power switch gear sales.

The formula called for the companies to rotate on a cyclic basis to be in a position to quote the low price on a Government contract. The formula was calculated, the complaint asserted, to give the appearance of competition while each firm knew the exact price it and the other firms would quote on each prospective sale.

Power Transformers

Defendants—Westinghouse, Allis-Chalmers, General Electric, McGraw-Edison, Moloney Electric and Wagner Electric.

The six firms and seven individuals were indicted May 25, 1960, with engaging in an unlawful conspiracy in violation of Section 1 of the Sherman Act. All pleaded guilty.

The indictment charged that representatives of the firms held numerous meetings in various cities to allocate Government business on a basis of an agreed percentage formula and to arrive at the prices to be paid.

Turbine-Generators

Defendants—General Electric, Westinghouse and Allis-Chalmers.

The three firms and four individuals were indicted June 29, 1960, on charges of conspiracy in restraint of inter-state trade in violation of Section 1 of the Sherman Act.

The indictment charged that the defendants selected General Electric as the organization to announce price increases which would

immediately thereafter be followed by the other defendants. The indictment further charged that the three firms allocated bids by designating one of their number to have "position" in connection with a specific project and that the other firms would submit higher bids. The three firms pleaded guilty.

The Carrier Corporation, DeLaval Steam Turbine Co., and the Worthington Corp., were named as co-conspirators in the damage suit.

Distribution Transformers

Defendants—General Electric, Allis-Chalmers, Kuhlman Electric Company, McGraw-Edison Company, Wagner Electric Corporation, Westinghouse and Moloney Electric Company.

The seven firms and five individuals were indicted May 25, 1960, with conspiracy to fix prices and submit collusive bids in violation of Section 1 of the Sherman Act. All defendants pleaded *nolo contendere* to the indictment.

Low Voltage Distribution Equipment

Defendants—Cutter-Hammer, Federal Pacific Electric, General Electric, I-T-E Circuit Breaker Company, Square-D Company, and Westinghouse.

The six firms were indicted June 23, 1960, with violating Section 1 of the Sherman Act. They pleaded *nolo contendere* to the indictment.

Named as co-conspirators in the damage suit were: Norbute Corporation, Murray Manufacturing Corporation, Wadsworth Electric Manufacturing Company, Zinsco Electric Products Company.

Low Voltage Circuit Breakers

Defendants—I-T-E Circuit Breaker Company, General Electric, and Westinghouse.

The three firms and four individuals were indicted February 16, 1960, with violating Section 1 of the Sherman Act. The defendants pleaded *nolo contendere* to the indictment.

Named as co-conspirators in the damage suit were: Allis-Chalmers and Federal Pacific.

U. S. v. *Grinnell Corp., et al.* (U. S. D. C. D. R. I., Complaint, April 13, 1961).

The Department of Justice took action seeking the breakup of four related firms which do the bulk of the nation's central fire and burglar alarm business.

Attorney General Robert F. Kennedy announced the filing of a civil antitrust suit filed in United States District Court in Providence, R. I., against:

> The Grinnell Corporation, Providence; and the American District Telegraph Co. (ADT), the Automatic Fire Alarm Company of Delaware (AFA), and Holmes Electric Protective Company, all of New York.

The complaint asserted that Grinnell controls the Holmes firm totally, holds 75 percent of ADT's common stock, and holds 88 percent of AFA's common stock.

Mr. Kennedy said the complaint charged the four companies "have attempted to monopolize and have monopolized" the central station protection business for many years, in violation of sections 1 and 2 of the Sherman Act.

The result, Mr. Kennedy said, has been elimination or curtailment of competition and the lack of a free and competitive market for consumers.

The complaint asked the court to require Grinnell to dispose of its ADT holdings and to require ADT "to divest itself of so much of its assets as may be necessary to assure competition . . . on the local level."

Specifically, the companies are accused of:

> —Making agreements to restrict the types of service and the protective equipment available;
>
> —Having "threatened and persuaded actual and potential competitors not to enter or to discontinue the business of central station electric protection service";
>
> —Initiating price wars in certain competitive areas "to injure and destroy competitors," intentionally charging less than in non-competitive areas.

Mr. Kennedy said the four firms grossed about $53,730,000 in 1959, about 90 percent of the national total for the business. In the same year, they had an estimated 79,500 subscribers, about 85 percent of the national total.

The complaint asserted that in 1959 the four defendant firms controlled 136 of the approximately 170 central stations in the nation. These are in 35 states and the District of Columbia.

ADT is "by far the largest" central station firm in the country, the complaint said, with 119 stations in 114 cities.

The complaint also asked the court for an injunction against continuance of the asserted offenses; an end to all agreements among the four companies; and the establishment of safeguards for consumers.

Central station protection includes installation of automatic sprinkler and alarm systems and maintenance of central control stations from which incoming alarms are transmitted to police and fire departments.

U. S. v. *Avdel, Inc.* (U. S. D. C. S. D. Calif., Indict., May 2, 1961).

A Federal grand jury in Los Angeles indicted Avdel, Inc., of Burbank, California, the nation's principal manufacturer of a "quick-release" pin important to the defense industry, on charges of violating the Sherman Antitrust Act.

The two-count indictment asserted that the firm and its international affiliates have suppressed competition, fixed prices, allocated bids and monopolized sales.

Attorney General Robert F. Kennedy said Avdel and its affiliates do more than 95 percent of the nation's quick-release pin business.

Quick-release pins are spring-loaded devices used instead of nuts and bolts in sections of missiles, airplanes and other defense equipment where rapid unfastening without tools is required.

A one-time Avdel rival, the D. W. Price Corp., of Los Angeles, also was named as a defendant, Mr. Kennedy said. The Price firm was absorbed totally by Avdel in about February, 1960.

Four foreign firms and five individuals were listed as co-conspirators but not as defendants. The firms are:

> United Fastenings Establishment of Vaduz, Liechtenstein; Aircraft Investments A.G. of Lucerne, Switzerland; Industrial

Advisory Corp., Geneva, Switzerland; and Aerpat A.G. of Glarus, Switzerland.

The individuals are:

Stanley T. Johnson, Geneva; John R. Bunney and Frank R. Borland, London; Edward D. Wilgus, Los Angeles; and Clare A. Mason, South Pasadena, California.

The indictment describes the five as having been active in the management of Avdel or one of its affiliated firms.

Avdel was organized in about June, 1947, as a subsidiary of Aviation Developments, Ltd., London, the indictment said. Avdel's stock later was taken over by Aircraft Investments and United Fastenings. It went into the quick-release pin business in 1951.

D. W. Price began to make the pins in 1953 and by 1958 had overtaken Avdel making approximately 50 percent of all domestic sales compared with 46 percent for Avdel.

The indictment charged that in March, 1957, the two firms began to conspire "to suppress and eliminate competition" in their field.

About August, 1958, the indictment charges, the firms eliminated actual competition between themselves and conspired "to make it appear to customers and potential customers of either firm that the two firms were in vigorous competition with each other."

In 1959, sales of quick-release pins in this country totaled approximately $2,700,000 of which Avdel accounted for 43 percent and D. W. Price 54 percent, the indictment said.

Avdel absorbed the assets of D. W. Price about February, 1960, the indictment said.

The firms are charged with violating sections 1 and 2 of the Sherman Act by:

1. Eliminating competition in the manufacture of quick-release pins;

2. Controlling U. S. patents relating to the devices;

3. Eliminating competition between themselves by secret agreement;

4. Eliminating competition between themselves by merger;

5. Fixing prices and allocating bids among themselves.

The indictment charged that as a result, Government and private purchasers of quick-release pins have been deprived of a "free, open and competitive market."

"Quick-release pins," the indictment said, "have important, distinctive, and essential uses in the construction, repair, and maintenance of military aircraft, missiles, and ground equipment . . . As such they are important to the defense program of the United States."

Maximum penalty is a $50,000 fine for each of the two counts.

U. S. v. *A. P. Woodson Co., et al.* (U. S. D. C. D. D. C., Indict., May 16, 1961).

Eight building supply firms and six of their executives were indicted by a federal grand jury for combining to fix Washington area prices of building materials.

Attorney General Robert F. Kennedy announced return of the indictment in United States District Court for the District of Columbia.

Two-thirds of the building materials sold in the area in 1960 were affected, according to the indictment, which charged violation of section 3 of the Sherman Act.

Named as defendants were:

A. P. Woodson Co. and vice president Nelson Woodson;

Eckington Building Supply Co. and Warren S. Gruber, president and director;

Hudson Supply and Equipment Co.;

R. Robinson, Inc. and Joseph H. Deckman, president and director;

The Cushwa Brick and Building Supply Co. and Jack A. Richardson, vice president and purchasing agent;

The United Clay Products Co. and John Cissell, sales manager of its building materials department;

Potomac Builders Supply Co. and Joseph Hill, president and director;

District Building Supply Co., of which Hill is also president and a director.

All the firms have their principal places of business in the District of Columbia except District Building, whose headquarters are in Alexandria, Va., Mr. Kennedy said.

The defendants and various co-conspirators conspired in and carried out a plan "to fix, stabilize and control prices for the sale of building materials," the indictment asserted.

The co-conspirators were identified only as "various other persons, including but not limited to, other dealer members of the Building Supply Division, Merchants and Manufacturers Association, Washington, D. C."

Effect of the combination, the indictment said, was to increase the price of building materials and to suppress and eliminate price competition.

Mr. Kennedy said the materials involved were Portland cement, masonry cement or mortar, building lime, plaster products, gypsum products, metal lath and wire mesh.

The indictment alleged the price-fixing agreements began at least as early as 1958.

In 1960, the indictment charged, all dealers in the Washington area purchased building materials valued at approximately $8,000,000. About $5,500,000 or approximately 67 percent of the total was purchased by the defendants and co-conspirators.

These dealers, the indictment said, sold the materials for approximately $6,750,000 to "contractors, public and private awarding authorities and the general public."

U. S. v. *Continental Oil Co.* (U. S. D. C. D. N. Mex., Complaint, May 16, 1961).

The Department of Justice charged that the Continental Oil Company of Houston, Texas, one of the nation's major petroleum producers, violated anti-merger provisions of the Clayton Act when it acquired the largest of seven New Mexico refineries in May, 1959.

Attorney General Robert F. Kennedy announced the filing of a civil complaint against Continental in United States District Court in Albuquerque, New Mexico.

Mr. Kennedy said the complaint asked that Continental be required to establish an independent, competing firm and transfer to it "all of the business and assets" acquired from Malco Refineries, Inc. of Roswell, New Mexico.

Acquisition of Malco, which was an independent refiner, may have served to "lessen competition or tend to create a monopoly,"

in violation of Section 7 of the Clayton Act, the Celler-Kefauver Amendment, the complaint charged.

According to the complaint, the acquisition gave Continental more than 20 percent of total gasoline sales in New Mexico and approximately 53 percent of the refining capacity in the state.

The complaint charged that the acquisition threatens the supply of gasoline to 50 independent jobbers and more than 200 service stations in New Mexico. These purchased gasoline from Malco for sale at "cut-rate" prices, in competition with higher-price gasoline from major firms like Continental.

Continental, the complaint said, sold its "Conoco" brand gasoline at 233 stations in the state in 1959.

The complaint also charged that the acquisition has eliminated competition between Continental and Malco in the purchase of crude oil and in refining in New Mexico.

Continental was described in the complaint as one of the major integrated petroleum companies in the nation, ranking eighth in domestic oil reserves, ninth in crude oil production, and fourteenth in refining capacity.

Continental's operations extend to the marketing of gasoline in some 8,000 service stations in 26 states. The complaint said its 1959 assets were $787,708,000.

Malco, the complaint said, was the largest of seven refiners in New Mexico before the acquisition and was "the largest source of supply of gasoline sold at 'cut price' service stations in New Mexico."

U. S. v. *Kaiser Aluminum & Chemical Corp.* (U. S. D. C. D. R. I., Complaint, April 28, 1961).

The Department of Justice, which sued Kaiser Aluminum and Chemical Corporation to block a proposed acquisition in the aluminum fabricating field, sought to require Kaiser to give up a fabricating plant which it owns.

In a civil antitrust complaint, the Department asserted that Kaiser's 1957 acquisition of the United States Rubber Company's Wire and Cable Department in Bristol, Rhode Island, violates Section 7 of the Clayton Act, Attorney General Robert F. Kennedy said.

The complaint, filed in United States District Court in Providence, Rhode Island, asks the court to order Kaiser to divest itself of all holdings it acquired in the Bristol plant.

Thursday, the Department asked a federal court in St. Louis, Missouri, to block Kaiser's planned acquisition of the Kawneer Company, an aluminum fabricator in the architectural products field, charging a violation of the same section of the Clayton Act.

The section, known as the Celler-Kefauver Act, forbids mergers or acquisitions which result in lessened competition or which tend to create monopolies, Mr. Kennedy said.

The complaint filed today charged that Kaiser's acquisition of the Bristol plant has substantially lessened general competition in the electrical conductor field, eliminated competition between United States Rubber and Kaiser's other aluminum wire and cable operations, and has lessened competition between Kaiser, an integrated firm making its own aluminum, and other firms which only fabricate.

The complaint asserted that "acquisition of fabricating facilities by the major aluminum producers has placed independent fabricators in the position of having to compete with their own suppliers."

Kaiser, the nation's third largest producer of primary aluminum, is described as the largest domestic producer of insulated aluminum wire and cable and the second largest producer in the aluminum electrical conductor field.

Acquisition of the Bristol plant, the complaint said, "substantially increased Kaiser's wire and cable business, which exceeded $27 million in 1956 prior to the acquisition."

In 1956, the Bristol plant had sales totaling $24,000,000 of which $3,500,000 came from aluminum wire and cable.

The complaint asserted that the Kaiser acquisition was part of a general tendency toward concentration in the aluminum wire and cable field, Mr. Kennedy said.

"The increase in concentration since 1956 has been dramatic," the complaint said, "in part as a result of the acquisition by the integrated producers of the leading independent fabricators."

On April 1, 1960, the Justice Department filed a similar action against the Aluminum Company of America challenging its acquisition of the Rome Cable Corporation of Rome, New York, a year earlier. The case is scheduled for trial this fall.

Alcoa's acquisition of an architectural products fabricator was challenged yesterday in St. Louis in a companion suit to that filed against Kaiser yesterday.

U. S. v. *Aluminum Co. of America, et ano.* (U. S. D. C. E. D. Mo., Complaints, April 27, 1961).

The Department of Justice brought actions against the Aluminum Company of America and the Kaiser Aluminum and Chemical Company to bar their expansion, by acquisition, into the aluminum architectural product field.

In two civil and antitrust complaints filed in United States District Court in St. Louis, Missouri, the Department said Alcoa's acquisition of the Cupples Products Corporation and Kaiser's proposed acquisition of the Kawneer Company violate anti-merger provisions of the Clayton Act.

Attorney General Robert F. Kennedy said one complaint asked that Alcoa, whose principal offices are in Pittsburgh, be ordered to divest itself of the Cupples firm, of St. Louis, which Alcoa acquired January 23, 1960. Both Alcoa and Cupples were named as defendants.

Mr. Kennedy said the second complaint asked the court to block Kaiser's acquisition of Kawneer, of Niles, Michigan. Kaiser's headquarters are in Oakland, California. The complaint said the firms agreed to the acquisition February 21, 1961, and said stockholder approval is anticipated at meetings May 1 and 2. Both Kaiser and Kawneer were named as defendants.

Alcoa's acquisition of Cupples, the Government charged, marked the first entry by acquisition of a big integrated producer into the aluminum architectural product field.

Both Kawneer and Cupples manufacture a variety of architectural aluminum products, such as curtain wall, doors, entrances and windows.

The complaints charge violation of section 7 of the Clayton Act, commonly called the Celler-Kefauver Act, forbidding mergers or acquisitions which result in substantially lessened competition or which tend to create monopolies.

Alcoa is described in the complaints as the nation's largest producer of primary aluminum and Kaiser as the third largest. Both firms are vertically integrated, from ore to fabricated aluminum products.

In 1959, Alcoa's sales exceeded $858,000,000, its assets exceeded $1,350,335,000, and it now controls more than 38 percent of domestic primary aluminum capacity, the Government said.

Kaiser's sales in 1960 were over $406,000,000, its assets over $785,000,000, and it controls about 23 percent of primary capacity.

Kawneer is described as "the principal domestic fabricator of aluminum store fronts and entrances." It produces aluminum curtain wall, custom extrusions and other products. Its 1960 sales were $39,420,059 and assets were $24,597,636.

Under terms of the acquisition agreement, "Kaiser is to issue to the holders of the outstanding shares of Kawneer stock approximately $29,273,900 in Kaiser stock in exchange for all outstanding Kawneer shares," the complaint said.

Cupples, and its Cupples Door and Frame Corporation subsidiary, produce a similar variety of aluminum products. Their combined sales in 1959, before acquisition, were $14,861,588 and assets were $5,955,-586, the Government asserted.

The Alcoa-Cupples complaint said Alcoa acquired the smaller firm in exchange for 62,309 shares of Alcoa stock, worth an estimated $6,750,000.

The effect of the Alcoa acquisition of Cupples and the proposed Kaiser acquisition of Kawneer, the complaints said, "may be substantially to lessen competition" or tend to create monopolies by:

—Eliminating potential competition in the architectural products field between Kaiser and Kawneer and Alcoa and Cupples;

—Giving Cupples and Kawneer competitive advantages over fabricators not connected with integrated primary aluminum producers;

—Possibly foreclosing sales of primary aluminum by Kaiser's primary aluminum production competitors to Kawneer and by Alcoa's competitors to Cupples.

U. S. v. *Wilbur B. Driver Co., et al.* (U. S. D. C. D. N. J., Consent Judgment, May 25, 1961).

A consent judgment was entered in an antitrust case against two of five electrical alloy resistance product manufacturers charged with price-fixing, monopolization and other violations of sections 1 and 2 of the Sherman Act.

Attorney General Robert F. Kennedy announced filing of the judgment in United States District Court in Newark, New Jersey,

which terminates action against the Wilbur B. Driver Company, Newark, New Jersey and the C. O. Jelliff Manufacturing Corporation, Southport, Connecticut.

The action, brought December 5, 1956, also named three other defendants, the Driver-Harris Company, Harrison, N. J.; Alloy-Metal Wire Company, Inc., Prospect Park, Pa. (and its successor, the H. K. Porter Company of Pittsburgh); and Hoskins Manufacturing Company, Detroit.

The trial is scheduled for this fall, Mr. Kennedy said.

The five defendant firms all manufacture electrical alloy resistance wire, ribbon, rod and strip used in radios, television sets, other home appliances and in other electrical equipment.

The two consenting firms are enjoined from participating in price-fixing agreements. The judgment also includes a provision that any future Government showing "of an appreciable number of identical bids in excess of $50 by a consenting defendant with any other defendant . . . shall be prima facie evidence of price-fixing."

This provision, Mr. Kennedy said, would put the burden of proof on the defendants, rather than on the Department of Justice.

The judgment also requires the two consenting companies to:

—Replace present price lists with new ones based on the firms' individual costs, and other lawful considerations;

—Make some patents, which the Government had charged were misused, available generally on a royalty-free basis and make other patents available for reasonable royalties;

—Provide technical information and know-how to patent licensees;

—Do business on a non-discriminatory basis.

The consenting defendants also are forbidden to acquire the stock or assets of other manufacturers of electrical resistance products.

U. S. v. *Utah State Pharmaceutical Assoc.* (U. S. D. C. D. Utah, Complaint, March 9, 1961).

The Department of Justice filed a civil complaint in Salt Lake City charging the Utah State Pharmaceutical Association with conspiracy to fix the prices of prescription drugs.

Attorney General Robert F. Kennedy, in announcing the filing of the complaint, said the Association is accused of violating section 1 of the Sherman Antitrust Act.

The complaint asserted that since at least the Fall of 1954, the Association, representing 80% of the pharmacies and pharmacists in Utah, has established uniform prices for prescription drugs. The effect has been that price competition has been suppressed and the price of prescription drugs sold to consumers in Utah has been increased, the complaint asserted.

The complaint asked the United States District Court in Salt Lake City for an injunction restraining the Association and its members from conspiring to fix prices. The court also asked for an order to dissolve the Association's Committee on Prescription Pricing, Wages and Hours.

The complaint was the fourth antitrust action taken by the Department of Justice since June in connection with the sale of prescription drugs in the West.

The Idaho State Pharmaceutical Association was charged in a civil complaint filed in Boise, Idaho, with conspiracy to fix prices.

Last December a federal grand jury in San Francisco indicted the Northern California Pharmaceutical Association and Donald K. Hedgpeth of San Francisco, on charges of fixing prices of prescription drugs sold in Northern California. Hedgpeth was chairman of the Association's pricing committee. The case has been set for trial in San Francisco on April 18.

The maximum penalty for violation of section 1 of the Sherman Antitrust Act in a criminal action is a $50,000 fine and a year in prison.

A civil antitrust complaint also filed last December charging conspiracy to fix prices, is pending against the Northern California Pharmaceutical Association.

Last June the Justice Department filed a civil complaint in Phoenix, Arizona, charging the Arizona Pharmaceutical Association, the Maricopa County Pharmaceutical Association, both of Phoenix, and the Tucson Pharmaceutical Association, Tucson, Arizona, with conspiracy to fix prices. The case has not yet been set for trial.

Federal Trade Commission Activity

F. T. C. v. *Bruce A. Graves & Son* (FTC Dkt. #8063, Consent Order, April 24, 1961).

Bruce A. Graves, doing business as Bruce A. Graves & Son, North, Nashville, Tenn., is prohibited from accepting unlawful brokerage on purchases of citrus fruit or produce, under terms of a consent order issued by the Federal Trade Commission.

The order was agreed to by both Mr. Graves and FTC's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner Leon R. Gross, which the Commission modified slightly and then adopted.

A Commission complaint, issued last August 3, charged that Mr. Graves has received brokerage or a discount in lieu of brokerage on purchases for his own account for resale from Florida citrus fruit packers, in violation of Section 2(c) of the amended Clayton Act.

F. T. C. v. *Apex Producing Corp., et ano.* (FTC Dkt. #7902, Consent Order, April 21, 1961).

The Federal Trade Commission has approved a consent order prohibiting Apex Producing Corp., Chicago, Ill., and Dempsey Nelson, Jr., its president-treasurer, from paying concealed "payola" to anyone as an inducement to play their recordings over radio and television.

Acting on a complaint filed May 20, 1960, the Commission affirmed an initial decision by Hearing Examiner Edward Creel based on an order agreed to by respondents and FTC's Bureau of Litigation.

The complaint charged Apex with giving television and radio disc jockeys or other personnel of broadcasting stations money or other valuable consideration to have its records "exposed" (broadcast regularly) in order to enhance their popularity.

The disc jockeys conceal the fact payments have been received for broadcasting the songs and mislead listeners into believing these records are selected strictly on their merits or public popularity, the complaint said.

This deception, it charged, tends to mislead purchasers into buying "exposed" records which they might not otherwise have purchased, and also to advance these recordings in popularity polls, which in turn tends to increase sales substantially.

The order specifies that respondents must not offer or give, without requiring public disclosure, any material consideration to anyone to induce the selection and broadcasting of records in which they have any financial interest.

"Public disclosure" means that the recipient must disclose to listeners when the record is played that this is in return for compensation received by him or his employer.

F. T. C. v. *C. F. Sauer Co.* (FTC Dkt. #8312, Init. Decision, June 6, 1961).

A Federal Trade Commission hearing examiner has issued an order which would dismiss a Commission complaint against The C. F. Sauer Co., Richmond, Va. The complaint, issued last March 13, charged the company with paying discriminatory promotional allowances to some customers in violation of Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

F. T. C. v. *Russell-Ward Co.* (FTC Dkt. #8207, Consent Order, June 2, 1961).

Approval of a consent order prohibiting Russell-Ward Co., a distributor-broker of food products in Seattle, Wash., from accepting illegal brokerage on its own purchases was announced by the Federal Trade Commission.

The Commission adopted an initial decision by Hearing Examiner Loren H. Laughlin based on an order agreed to by both the company and the FTC's Bureau of Litigation.

In a complaint filed last December 7, the FTC charged that Russell-Ward violated Section 2(c) of the amended Clayton Act by receiving brokerage or a discount in lieu of brokerage on purchases of citrus fruit for its own account for resale.

F. T. C. v. *Sergeant & Nicholoy, Inc., et ano.* (FTC Dkt. #8364, Complaint, May 10, 1961).

Sergeant & Nicholoy, Inc., and Little Farmer Foods, Inc., Butler, Wisc., and Robert C. Engle, an official and the principal stockholder of both, are charged in a Federal Trade Commission complaint with receiving unlawful brokerage payments.

The former concern is a broker of canned goods and other food products, and the latter is a food wholesaler or distributor.

The complaint alleges that Little Farmer makes numerous purchases for its own account for resale through Sergeant & Nicholoy, which is paid a brokerage or commission on the transactions by the sellers.

In view of Mr. Engle's ownership and control of both the brokerage firm and the buyer, the complaint contends, this is tantamount to Little Farmer receiving brokerage on its own purchases, which is forbidden by Section 2(c) of the amended Clayton Act.

F. T. C. v. *Comptone Co., Ltd.* (FTC Dkt. #8377, Complaint, May 12, 1961).

Comptone Company, Ltd., a manufacturer and distributor of sunglasses, New York City, was charged by the Federal Trade Commission with misrepresenting the quality, make, and guarantee of its products.

The company also is charged in the FTC's two-count complaint with paying discriminatory promotional allowances to favored customers.

Count I of the complaint challenges various statements made by the company on labels attached to its products and in sales brochures, counter display cards, and other promotional material furnished to jobbers, retailers, and dealers.

For example, the complaint charges that Comptone deceptively described its sunglasses as "precision made to high optical standards," thereby falsely representing that its glasses have been manufactured according to strict tolerances to have particular qualities which would be recognized or considered desirable in optical instruments by opticians or optometrists.

Also alleged to be false is the description "lenses formed to 6 base convex shape." The complaint alleges that the lenses do not have a 6 base curve or a diopter curve of 6

The complaint further charges that the concern's sunglasses are not unconditionally guaranteed as implied by the statement "Guaranteed Safe Lenses." The complaint adds that the nature and extent of the guarantee and how it will be honored are not revealed in the concern's advertising matter.

An additional allegation in Count I is that some of the sunglasses sold by the company have lenses manufactured in Japan and this fact

is not clearly and conspicuously disclosed by markings or labels on the products.

The complaint contends that the company's use of these deceptive practices has the capacity and tendency to mislead the public and has diverted trade unfairly from competitors in violation of the FTC Act.

Count II of the complaint charges that Comptone has made payments to some of its customers for promotion of its products but has not made these payments available on proportionally equal terms to all other competing customers as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaint says that in 1960 the company made a discriminatory promotional payment of $5,000 to United Whelan Corp. of Brooklyn, N. Y.

Joined in the complaint are Comptone's officers, Manuel R. Nadel and George Jacques.

F. T. C. v. *T. W. Holt & Co., Inc.* (FTC Dkt. #8371, Complaint, May 9, 1961).

T. W. Holt & Co., Inc., Jacksonville, Fla., is charged in a Federal Trade Commission complaint announced with paying discriminatory promotional allowances to favored purchasers of its "Flaga" dried peas and beans, and rice.

The complaint alleges that Holt has paid some customers allowances which were not made available to their competitors on proportionally equal terms as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaint says, in 1960 the company made a preferential payment of $250 to Winn-Dixie Stores, Inc., a retail grocery chain with headquarters in Jacksonville.

F. T. C. v. *Haffield Fruit Co., Inc., et ano.* (FTC Dkts. #8357, 8359-60, Complaints, May 8, 1961).

Charges that the following two citrus fruit packers have made illegal brokerage payments to some buyers were announced by the Federal Trade Commission.

(8357) Haffield Fruit Co., Inc., Vero Beach, Fla.

(8359) Pride O'Texas Citrus Association, Inc., Mission, Texas.

The FTC also issued a complaint (8360) against Eastern Marketing Service, the partnership of W. B. Stevens and H. Palmer Eastwood, Bartow, Fla., on charges of receiving unlawful brokerage. The partners are brokers, selling agents, and distributors of citrus fruit and produce.

The complaints allege that Haffield and Pride O'Texas have paid some brokers and direct buyers, and Eastern has received from various suppliers, brokerage or discounts in lieu of brokerage on purchases of citrus fruit for the buyer's own account for resale, in violation of Section 2(c) of the amended Clayton Act.

F. T. C. v. *Borg-Warner Corp.* (FTC Dkt. #7667, Consent Order, May 8, 1961).

The Federal Trade Commission has approved a consent order forbidding Borg-Warner Corp. and its wholly-owned subsidiary, Borg-Warner Service Parts Co., both of Chicago, to discriminate in price among competing purchasers of their automotive replacement parts and related items.

Acting on a complaint issued December 1, 1959, the FTC adopted an initial decision by Hearing Examiner Walter R. Johnson based on an order agreed to by the two concerns and the Commission's Bureau of Litigation.

The complaint alleged that respondents violated Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act by giving jobbers belonging to buyer groups higher discounts than competing non-group-buying jobbers on purchases of replacement parts of like grade and quality.

These price discriminations, the complaint charged, may substantially lessen competition or tend to create a monopoly in the lines of commerce in which respondents and their favored customers are engaged.

The Commission dismissed this allegation insofar as it relates to respondents' lines of commerce.

The order requires that the companies must charge the same net prices to purchasers who compete with each other in reselling or distributing the products. The term "purchaser" includes any customer buying directly or indirectly through group buying organizations or any related device, but does not include original equipment manufacturers purchasing automotive parts for replacement use or sale.

The agreement does not preclude a further investigation and the issuance of a complaint against Borg-Warner Corporation's sale of replacement parts to original equipment manufacturers if this is indicated.

F. T. C. v. *Bisese & Console, Inc.* (FTC Dkt. #8057, Consent Order, May 22, 1961).

The Federal Trade Commission has issued a consent order forbidding Bisese & Console, Inc., Norfolk, Va., a wholesale grocer or commission merchant, to accept unlawful brokerage on its own purchases of citrus fruit or produce.

In taking this action, the FTC affirmed an initial decision by Hearing Examiner Raymond J. Lynch accepting an order agreed to by the company and the Commission's Bureau of Litigation.

The concern was charged in the FTC's complaint of last July 29 with receiving brokerage or discounts in lieu of brokerage on purchases of citrus fruit for its own account for resale, which is forbidden by Section 2(c) of the amended Clayton Act.

F. T. C. v. *Idaho Canning Co., Ltd.* (FTC Dkt. #7495, Consent Order, May 22, 1961).

Idaho Canning Co. (LTD), Payette, Idaho, a processor of fruits and vegetables, is prohibited by a consent order approved by the Federal Trade Commission from favoring any customers with discriminatory prices or promotional allowances.

The order was agreed to by both the company and FTC's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner Edgar A. Buttle, which the Commission adopted.

The FTC issued its complaint on May 15, 1959, alleging that Idaho (1) charged competing customers different prices for products of like grade and quality, in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act; and (2) granted advertising allowances to some purchasers without making them available on proportionally equal terms to all competing customers, as required by Section 2(d) of the law.

Fred Meyer, Inc., 721 Southwest Fourth Ave., Portland, Ore., operator of a retail merchandise chain, was cited as a typical recipient of these discriminatory benefits.

According to the complaint, Idaho gave Meyer a preferential promotional payment of $350 for its participation in the chain's 1957

coupon book program. Also, Idaho sold Meyer about 4,000 cases of canned corn and reimbursed it 12.1¢ for each coupon redeemed, which had the net effect of giving the chain the value of one can for every two cans actually purchased.

The complaint had alleged that Idaho's price discriminations may substantially lessen competition or tend to create a monopoly both in the lines of commerce engaged in by the company itself and by its customers.

This allegation was dismissed insofar as it relates to Idaho's line of commerce on grounds that "the evidence in the light of subsequent developments is insufficient to substantiate" it.

The order requires Idaho henceforth to charge the same net prices to competing customers, and to pay allowances on a proportionally equal basis only.

F. T. C. v. *Penick & Ford, Ltd.* (FTC Dkt. #8118, Consent Order, April 28, 1961).

A consent order affirmed by the Federal Trade Commission forbids Penick & Ford Ltd., New York City, a manufacturer of food products, to discriminate among its customers in paying advertising allowances.

The order was agreed to by both the company and FTC's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner John B. Poindexter, which the Commission adopted.

The concern was charged in the FTC's complaint of last September 16 with paying allowances to some customers but not making them available on proportionally equal terms to all competing customers, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The complaint cited Benner Tea Co., a retail grocery chain with headquarters in Burlington, Iowa, as a typical recipient of these discriminatory payments.

Penick & Ford's agreement to pay allowances on a proportionally equal basis only in the future is for settlement purposes only and does not constitute an admission that it has violated the law.

F. T. C. v. *Barry-Newberg & Co.* (FTC Dkt. #8350, Complaint, May 1, 1961).

Charges that Barry-Newberg & Co., Los Angeles, Calif., has misbranded and falsely invoiced furs were made by the Federal Trade Commission.

An FTC complaint alleges that various of the company's furs were not labeled and invoiced with each element of information required by the Fur Products Labeling Act.

On various labels, the complaint continues, required item numbers were omitted and required information was handwritten and mingled with non-required information, in violation of the Rules issued under the Fur Act.

F. T. C. v. *Haines City Citrus Growers Ass'n* (FTC Dkt. #7144, Orders, June 9, 1961).

The Federal Trade Commission has ordered Haines City Citrus Growers Association, Haines City, Fla., a cooperative of approximately 140 citrus grove owners, to stop paying unlawful brokerage to buyers for their own account.

In addition, the following three broker customers of the association were ordered to discontinue accepting such payments:

E. B. Garrett Co., Inc., Greensboro, N. C.

Sam J. Bushala, doing business as Sam Bushala, San Francisco, Calif.

Dale G. Snyder, trading as D. G. Snyder Brokerage Co., Memphis, Tenn.

In a complaint filed May 7, 1958, the FTC alleged that Haines City has made direct sales to Garrett, Bushala, Snyder and other brokers buying for their own account for resale and granted them brokerage or an allowance or discount in lieu of brokerage. These transactions, the complaint charged, violate Section 2(c) of the amended Clayton Act, which forbids the payment or acceptance of brokerage on the buyer's own purchases.

In ruling on the matter, the Commission today acted on two initial decisions filed May 27 and June 30, 1960, respectively, by Hearing Examiner Abner E. Lipscomb. It adopted the earlier initial decision, which accepted a consent order agreed to by Mr. Snyder and the Commission's Bureau of Litigation. This agreement is for settlement purposes only and does not constitute an admission by Mr. Snyder that he has violated the law.

The second initial decision contained an order against the other three respondents based on the evidence received at hearings on the complaint.

Granting a motion by Haines City, the Commission permitted the association to withdraw its appeal from the latter initial decision, and then also adopted this decision after modifying it by incorporating a stipulation between Haines City and FTC trial counsel clarifying the intent of the complaint and of the order as to this respondent.

Notes

Loevinger Warns of Stiffer Criminal Antitrust Penalties

A warning of efforts on the part of the Justice Department to increase the severity of penalties for individual defendants in criminal antitrust cases was voiced by Lee Loevinger in speaking to the Antitrust Section of the American Bar Association at its Washington, D. C., meeting on April 7.

The new Antitrust Chief said he wanted "to lay at rest a few . . . shibboleths of the antitrust bar," such as "the notion that violation of the antitrust laws, whether intentional or not, is merely a normal business risk." Pointing to the convictions in the Philadelphia electric cases obtained by his predecessors, he emphasized that "it should now be clear that a deliberate or conscious violation of the antitrust laws is not a mere personal peccadillo or economic eccentricity, but a serious offense . . . Those who are apprehended . . . will personally be subjected to as severe a punishment as we can persuade the courts to impose."

He also stated that "the Antitrust Division is not receptive to pleas for exceptions, exemptions or special treatment of any company or industry . . . in general we will oppose exceptions to or exemptions from the antitrust laws, sought by way of Departmental policy or judicial rulings."

Commenting on law changes, Mr. Loevinger dealt primarily with possible modification or relaxation in some areas, and this he opposed, on the ground that there is sufficient flexibility in existing laws. "When asked for comment on a legislative proposal for antitrust exemption, we will take a long, hard look. With exceptions

already covered by existing laws, we have seen no persuasive case for compromising any antitrust principles in special cases."

FTC Not Releasing List of Antitrust Cases to Be Investigated

We understand the Federal Trade Commission has no plans to make public the list of antitrust cases which Attorney General Kennedy asked it to investigate. The door has not been permanently closed, but it is expected to remain shut for some time.

Craig Siegfried, et al. v. *The Kansas City Star Co., and Sees.* (U. S. D. C. W. D. Mo., W. Div., filed March 1, 1961).

A jury could not compute the damages to a local newspaper, a "shoppers" newspaper, and a radio station on the basis of national average gross revenues for comparable enterprises; net profits must be shown. Nor could minimum damages for refusal to publish the radio station's program log in the defendant's newspaper be based on the amount it would have cost to publish it as a daily advertisement; this was an expense which was never incurred. Other attempts to establish income failed for commingling of accounts, and failure to justify allocations.

California v. *El Paso Natural Gas Co.* (C. A. D. C. Cir., decided March 30, 1961).

The Federal Power Commission properly approved the merger of a utility whose stock had previously been purchased, balancing the antitrust law policy of free competition against the partial or complete monopoly favored under utilities regulation and determining that the public interest would be served by the merger. It was not necessary for the Commission to consider separately the legality, under the antitrust laws, of the earlier acquisition of stock (which the seller had insisted upon in order to avoid the necessity for seeking Commission approval of the asset transfer). Both the stock purchase and the merger (concededly spurred by the filing of a Clayton Act suit challenging the stock acquisition) were part of a single transaction.

Skouras Theatres Corp. v. *Radio-Keith-Orpheum Corp.* (U. S. D. C. S. D. N. Y., filed March 29, 1961).

A government suit tolled the limitations period, as to defendants who did not appeal, until the appeal period expired. As to those which appealed, the suspension ended on the day the Supreme Court

denied rehearing of its decision, notwithstanding formalization in a later consent decree. Where a consent decree proposed reorganization of corporate defendants, and stated that the decree would be of no force unless the reorganization was ratified by stockholders by a specified date, the suspension ran until the date of ratification. As to new corporations created pursuant to a decree, the plaintiffs had to establish themselves as third party beneficiaries of a contract to assume liability for the predecessor corporations in order to extend the limitation period back before creation of those corporations.

A pooling agreement which plaintiff film exhibitors charged they were wrongfully forced to enter upon was a single injury, and the limitation period ran from the date of its execution, unless the plaintiffs established independent acts and injuries (forcing their continued participation) not sanctioned by the agreement, or modifications which would in effect create a new pooling agreement.

Corporations which had leased their theatres, receiving management fees for representing the sublessees in business transactions with the defendants, were non-operating landlords not entitled to sue under the antitrust laws, even though they might own the entire stock of an operating sublessee.

Kenmore-Louis Theatre, Inc. v. *Sack, et al.* (U. S. D. C. D. Mass., dated March 29, 1961).

Activities of a distributor soliciting rentals for defendant's films, collecting rentals, handling complaints, and receiving box office statements, were such that the defendant was found in the district, and venue was proper.

Independent Production Corp., et ano. v. *Loew's, Inc., et al.* (U. S. D. C. S. D. N. Y., filed March 28, 1961).

Defendants having elected to obtain a court ruling on whether plaintiff's agent should answer questions as to which he pleaded possible self-incrimination, before going on to other questions plaintiff was entitled to have the examination continued in another state (where the witness had returned) and to fees and travel expenses for its attorney. Although the court could order dismissal of a suit if plaintiff or its agent refused to answer questions, even through inability, if the information was not otherwise available, it refused to do so where the information related to desirability of business associa-

tion with the plaintiff, and the information should be available. Plaintiff's agent had pleaded possible self-incrimination.

United States v. *The White Motor Co.* (U. S. D. C. N. D. Ohio, E. Div., filed April 21, 1961).

The White Motor Co.'s distribution system, under which the territory in which each of its distributors and dealers could make sales was specified, has been held to violate Secs. 1 and 3 of the Sherman Act. Although a manufacturer may properly impose restrictions as to standards of operation, policies, and sales or repair facilities, the court said, it "can fare no better in a system of identical contracts with its distributors and dealers allocating territories and customers than could the distributors and dealers themselves "if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other.' "

Similarly, that phase of distributor and dealer licenses which fixed the prices at which trucks could be sold to dealers (though no restrictions were placed on customer prices), and fixing maximum prices for parts and accessories sold to dealers or to government or fleet purchasers, was a *per se* violation of Secs. 1 and 3. The same result was reached as to restrictions on sales to government units and specified national or fleet purchasers, and the necessity for obtaining consent of the manufacturer before making sales to any person or company for resale.

Erie Sand and Gravel Co. v. *Federal Trade Commission* (C. A. 3rd Cir., filed May 29, 1961).

Acquisition of the assets of a going business which had shown a profit in recent years could not be justified either because the purchase was made on open bidding after a decision to sell had been made, or under the failing company doctrine. The fact that other substantial bids had been submitted indicated that the alternative to the respondent's purchase was not disappearance of the acquired business as a competitor, a key element of the failing company test.

Functional interchangeability of sand dredged from a lake bed (for use in concrete) with that taken from inland banks and pits was clearly demonstrated through their use in highway and other construction. Accordingly, the Federal Trade Commission erred in not considering the volume of bank and pit sand (shown to be sub-

stantial) in determining the competitive effects of an acquisition of a lake sand producer by another such company, in the 12-mile-deep strip along the lake shore selected by the FTC as the appropriate "section of the country." However, because production and transportation costs could be a major factor in determining the area of competition, the court left open the question of whether the section of country should be as determined by the FTC, or a series of semicircular areas around dock facilities, as used by the government for appeal purposes.

Johnson & Johnson v. *Lindemann Pharmacy, Inc.* (U. S. D. C. S. D. N. Y., filed May 22, 1961).

On a finding that a fair trade injunction had been violated, the respondent was ordered to pay an amount sufficient to cover attorneys' fees and expenses of "shoppers" making the purchases.

Raul International Corp. v. *Nu-Era Gear Corp.* (U. S. D. C. S. D. N. Y., filed May 24, 1961).

Even though defendant had no property or personnel in the district, and customers were solicited only through two independent representatives, the substantial number and dollar volume of shipments into the district was sufficient to satisfy the venue requirements of Clayton Act Sec. 12. Also, service on a representative who had placed defendant's name in the telephone book with his number and address, as well as in his office building directory, was proper; under either the Federal rules or New York law the "intent" of the provision for service on an agent "must be" authority to serve the highest ranking person in charge of a corporation's activities, if those activities are sufficient for venue purposes.

Johnson & Johnson v. *Avenue Merchandise Corp., et al.* (U. S. D. C. S. D. N. Y., dated April 7, 1961).

The fact that a fair trading manufacturer makes sales to an "ultimate consumer" does not necessarily make it a retailer for purposes of the McGuire amendment. More significant is the nature of use by the purchaser, and the number and dollar amounts of sales. A retailer is customarily regarded as one who makes numerous small sales, for home use or consumption. Accordingly, a manufacturer's sales of medical dressings to a New York industrial plant (where they became part of the manufacturing cost) in minimum amounts of

$50, or to two hospitals at a substantial distance from the defendant retailer, did not disqualify it from enforcing a fair trade contract.

United States v. *The Watch Makers of Switzerland Information Center, Inc., et al.* (U. S. D. C. S. D. N. Y., dated March 22, 1961).

A subpoena covering documents in Switzerland, which would have to be assembled and translated, with examination by the defendant as to relevancy, was refused under Rule 45, particularly in view of the extensive pre-trial discovery previously allowed and the possibility of discovering the nature of the defense.

General Precision Equipment Corp. v. *The Martin Co.* (U. S. D. C. S. D. N. Y., dated April 17, 1961).

Plaintiff having offered to take depositions and conduct pretrial discovery where documents were located, and other factors of convenience being equal, transfer was denied.

Crawford Transport Co., Inc. v. *Chrysler Corp. and Commercial Carriers, Inc.* (U. S. D. C. E. D. Ky., Jan. 26, 1961).

Location of home offices, witnesses and documents being weighted equally as to both districts, defendant's request for a transfer was denied; the balance of convenience should be shown to be strongly in favor of the defendant, to justify a transfer. Service of process on the local agent required under the Federal Motor Carriers Act was sufficient.

Transmirra Products Corp. v. *Monsanto Chemical Co.* (U. S. D. C. S. D. N. Y., dated April 4, 1961).

Severance of antitrust issues in a patent suit was granted in view of the facts that they were subject to jury trial, while the patent issues were not, and that a separate suit involving the same issues had been filed by the pleader's assignee.

BOOK REVIEWS

Antitrust Policy. An Economic and Legal Analysis, by Carl Kaysen and Donald F. Turner (Cambridge: Harvard University Press, 1959. Pp. xxiii, 345, $7.50).

Existing law is apparently inadequate to cope with highly concentrated industries whose leading firms, recognizing their interdependence, enjoy great market power despite the absence of a conspiracy in restraint of trade. The authors of this study, Harvard professors of economics and law respectively, call for an amendment to the Sherman Act which would eliminate market power not due to economies of scale, basic patents, innovations, or "extraordinary efficiency." They urge a program of reorganization of market structures by dissolution proceedings which would not sacrifice scale efficiencies or progressiveness.

The 58 national market manufacturing industries whose 8 leading firms made at least 50% of the shipments would probably be affected, or, on a narrower definition, the 41 industries whose 8 leading firms were responsible for 75% or more. Kaysen and Turner would find a conclusive presumption of market power when for at least five years a single firm accounted for 50% of sales (shades of Bryan), or, no more than four firms for 80%. Proceedings would "typically center on an analysis of market structure and of those aspects of market performance which are relevant to a judgment of market power" (p. 112). Firms should be subject to vertical divestiture (or injunctions, if this is not practicable), where undue market power at one stage cannot be eliminated. Mergers would be *prima facie* illegal when the resulting firm has 20% of the market.

As such a program would not eliminate all positions of market power, the law must continue to deal with conduct, they reason. Price- or output-fixing, boycotts, and tie-ins should continue to be *per se* offenses. Our authors consider the *Taj Institute* decision too permissive. Forbid patentees to arrange cross-licenses or pools going beyond uniform royalty licenses in each field to which they apply, and to condition licenses on grant-backs or exclusive licenses. They would also replace the Robinson-Patman Act with a new law restricting price discrimination.

A careful quantitative examination of American market patterns in manufacturing and mining in terms of size, geographic extent, and concentration is a very valuable feature of the study. The 55 page statistical and methodological appendices to this chapter explain the derivation of the results. Structural oligopoly, where the first 8 firms occupy at least one-third of the market, is shown to be widely prevalent. The strategically-situated investment goods and industrial materials industries are predominantly concentrated. The authors neglect imports, however, when they suggest that their findings probably understate the number of oligopolistic markets (p. 29).

The key proposal—dissolution of positions of unreasonable market power, wherever possible—was made in essentially the same terms in 1951 by the distinguished Committee on Cartels and Monopoly set-up by the Twentieth Century Fund.[1] The notable silence of the Attorney-General's National Committee to Study the Antitrust Laws on this issue (1955) presumably denoted majority satisfaction with the status quo.[2] Professor Bain has recently endorsed the Kaysen-Turner approach. Their outlook is shared also by Dean Rostow who, however, remains of the view that it may not be necessary to amend the Sherman Act to attain the goals.[3]

By contrast, Professors Dirlam and Kahn are unsympathetic to the suggestion that market structures be reorganized. That "rational limitation upon monopoly" is impossible is the view of the Hales who instead would replace Section 2 with a provision limiting the over-all size of the firm.[4]

With this, of course, Kaysen and Turner would disagree. Indeed, they would not prevent large firms from entering into conglomerate mergers save perhaps in "some extreme cases where adverse effects are obvious or the concentration of wealth is huge" (p. 135)—*e.g.*,

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[1] George W. Stocking and Myron Watkins, *Monopoly and Free Enterprise* (New York 1951), p. 564.

[2] Cf. the dissent by Prof. Schwartz to the *Report of Attorney General's National Committee*, in 1 *Antitrust Bulletin* (1955), 40-45.

[3] Joe S. Bain, *Industrial Organization* (New York, 1959), p. 610; Eugene V. Rostow, *Planning for Freedom* (New Haven, 1959), pp. 299-300.

[4] Joel Dirlam and Alfred E. Kahn, *Fair Competition* (Ithaca, 1954), p. 284; George E. and Rosemary D. Hale, *Market Power* (Boston, 1958), p. 404.

A. T. & T. or U. S. Steel. Their view on conglomerates may embody too extreme an application of the logic of their market power test.[5]

This 272 page volume (not counting the appendices) was not intended as a comprehensive review and critique of the major cases and literature of antitrust. Nevertheless a concrete example contrasting the actual handling of a recent major decision with the manner in which it would have been dealt on the Kaysen-Turner criteria would have proven illuminating. Brevity is attained at the expense of clarity when vertical integration is said to have "important effects on price policy" (p. 121) without more.

The only significant typographical error lists the F. T. C. where the F. P. C. is intended (p. 260). In three different places (pp. xi, 239, 248) the amendment to section 7 of the Clayton Act is dated 1951 instead of 1950.

There has not been a public debate on the basic policy issues involved in the question of the structure of industrial markets for almost half a century. The new administration and Congress should seriously consider the important proposals made in this volume.

BENJAMIN J. KLEBANER
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A. & P.: A Study in Price-Cost Behavior and Public Policy, by M. A. Adelman (Harvard University Press, Cambridge, Mass. (1959)).

This study is essentially a denunciation of both the Robinson-Patman Act and the antitrust prosecution and court decisions in the Sherman Act case against A. & P. Adelman seeks to demonstrate that the price allowances A. & P. received and the firm's low-price high-volume policy were but part of vigorous competition, and that the government was totally wrong in charging the firm with predatory competition.

Adelman examines the structure of A. & P. and the market place and the impact of the passage of the Robinson-Patman Act. He rebuts the argument that A. & P. had monopoly power. He insists that the firm, through its economic efficiency, had but the power to seek out the best alternatives in time and space. He claims that A. & P. was frequently discriminated *against,* since the Robinson-

[5] John M. Blair, "Conglomerate Merger in Economics and Law," 46 *Georgetown Law Journal* (1958), 672-700.

Patman Act did not in reality permit cost differences to be fully reflected in prices.

His attack on the government's case against A. & P. is scathing. He sees the financial data manipulated (p. 369), the statistical data biased (p. 234). The government's case was of "extraordinary confusion and evanescence" (p. 327), characterized by "know-it-all simplicity" (p. 247), lacking in any real evidence in many instances, and smacking of insinuation and ingenious methods of proof (p. 217). In short, the case was "sheer economic illiteracy" (p. 371). And the District Court Judge failed to understand the mass of evidence (p. 380). Adelman's language is much like that which he attributes to the government—colorful.

A stated principal object of the study is to re-examine the facts "to find out *what actually happened*" (p. 4). His theoretical analysis is buttressed with abundant footnote references and data from the record (100 pages of supporting detail in appendixes). Quotations, especially from intrafirm correspondence are sprinkled freely throughout. This approach is quite evident in the first hundred pages which trace A. & P.'s sales and price policy over the several years prior to the antitrust suit. The dissenter may dispute his selection of facts from the massive record (he charges the judicial process with grinding out "unfacts," p. 5) or the premises which are the basis of his logic.

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Notes

Joseph W. Shea Named Secretary of FTC

The Federal Trade Commission today announced the appointment of Joseph W. Shea, 53, of Dorchester, Mass., as Secretary of the Commission effective May 1. The appointment, made by Chairman Paul Rand Dixon, was confirmed unanimously by the full Commission.

A career employee with over 20 years service as an investigating attorney, he moves up from the post of Legal Adviser on Deceptive Practices in the Bureau of Investigation, after participating in many of the FTC's most significant proceedings against false advertising and other unfair business activities.

During World War II he became a Lieutenant Commander in the United States Navy, serving in the North Atlantic.

Mr. Shea was born in Dorchester and is the son of Katherine C. Shea, who resides at 1 Hurlcroft Ave. After graduating from Dorchester High School and Dean Academy, Franklin, Mass., he received an A.B. degree from Boston College in 1931 and his law degree from Georgetown University in 1938.

A well-known athlete in his scholastic and collegiate days, Mr. Shea is an avid and long-suffering fan of the Boston Red Sox.

He is married to the former Helen Murphy, also from Dorchester, who is a graduate of Emanuel College, Boston. With their three children, Michael, 13, Kathleen, 12, and Eileen, 11, they make their home in Georgetown at 1530 34th St., N.W.

Attorney General Robert F. Kennedy asked Congress to strengthen antitrust enforcement by enacting pre-merger notification and civil investigative demand bills.

The pre-merger notification measure, already introduced in the House by Representative Emanuel Celler, would require large firms to inform the Department of Justice before merging.

The civil investigative demand measure, already introduced in the Senate by Senator Estes Kefauver, would empower the Department to compel firms to turn over records believed pertinent to antitrust investigations.

"Neither of these measures changes the substance of the antitrust statutes," Mr. Kennedy said. "They provide, however, new and necessary tools for enforcement of the statutes.

"At present, we are virtually powerless when a firm flouts our request for information about a merger or about a possible civil violation of the Sherman or Clayton Acts. The impaired enforcement which results is damaging both to the public interest and to competing firms, trying hard to live up to the law."

The merger bill, an amendment to the Clayton Act, would require that the Department of Justice or other appropriate agencies would be notified prior to any merger resulting in a new firm with assets exceeding $10,000,000.

Mr. Kennedy said such advance notification would allow the Government to evaluate the competitive effect of a proposed merger and indicate whether it would object.

The bill would greatly reduce the often costly difficulties of restoring already merged firms to their original status, following successful Government opposition in court, Mr. Kennedy said.

Advance notification also would facilitate equal enforcement of the Clayton Act, he said. "It would prevent companies from merging secretly to gain advantage over law-abiding competitors." The Celler bill sets the maximum penalty for wilful failure to comply at a $50,000 fine.

A like bill also has been introduced in the House by Representative Wright Patman of Texas.

The second measure Mr. Kennedy called for would, in effect, provide the Department of Justice with civil subpoena power in antitrust investigations.

In present civil investigations, the Department must rely on documents submitted voluntarily.

"Knowing this," Mr. Kennedy said, "many firms have refused to comply with or have only partially complied with requests from the Department for information."

In a few instances, where a criminal violation of the Sherman Act is possible, a grand jury can be convened to apply subpoena powers. But generally, there now is no further action the Justice Department can take.

The new measure would permit the serving of a civil investigative demand for documents or records believed pertinent to antitrust investigation.

Court enforcement and a maximum penalty for non-compliance of five years imprisonment and a $5,000 fine are provided for in the bill.

Six small business bills introduced by Senator Hubert H. Humphrey, Chairman of the Committee's Subcommittee on Retailing, Distribution and Marketing Practices. S. 1799 would provide for a graduated income tax on corporations. S. 1800 prohibits the waiver of private antitrust enforcement rights. S. 1801 declares private antitrust suits to be invested with a substantial public interest. S. 1802 requires publication of the terms of antitrust consent judgments. S. 1803 prohibits loss leader sales. S. 1804 authorizes disaster loans to small firms injured by condemnation proceedings in federally-aided highway construction programs.

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